No. 90-1150-CFX
Status: GRANTED

Title: Donald J. Willy, Petitioner
v.
Coastal Corporation, et al.

Docketed:
January 17, 1991

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Maness,Michael A.

Counsel for respondent: Reed,James L., DeMoss,Robert C., Phillips,Carter G.

Entry	Date	Note	Proceedings and Orders
1	Jan 17 1991	G	Petition for writ of certiorari filed.
3	Feb 8 1991		Order extending time to file response to petition until February 28, 1991.
4	Feb 20 1991		DISTRIBUTED. March 15, 1991
5	Feb 27 1991	X	Brief of respondents Coastal Corporation, et al. in opposition filed.
6	Mar 4 1991	X	Reply brief of petitioner Donald Willy filed.
7	Jun 10 1991		REDISTRIBUTED. June 13, 1991
8	Jun 17 1991		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
9	Jun 26 1991		Record filed.
		*	certified copy of original record and proceedings, 12 vols. (Box).
10	Jul 30 1991		Joint appendix filed.
11	Jul 30 1991		Brief of petitioner Donald Willy filed.
13	Aug 14 1991		Order extending time to file brief of respondent on the merits until October 3, 1991.
14	Oct 3 1991		Brief of respondents Coastal Corporation, et al. filed.
15	Oct 15 1991		SET FOR ARGUMENT TUESDAY, DECEMBER 3, 1991. (2ND CASE)
16	Oct 24 1991		CIRCULATED.
17	Oct 25 1991	X	Reply brief of petitioner Donald Willy filed.
18	Dec 3 1991		ARGUED.

90-1150

Supreme Court, U.S.
FILED
JAN 17 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DONALD J. WILLY,

Petitioner,

versus

THE COASTAL CORPORATION, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Michael A. Maness
Counsel of Record
for Petitioner
1900 North Loop West
Suite 500
Houston, Texas 77018
(713) 680-9922

January 1991

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QUESTIONS PRESENTED

1. In the absence of subject matter jurisdiction, does Article III § 2 of the Constitution foreclose a federal court's award of attorney's fees to a defendant that wrongly removed the case from a state court, against a plaintiff who successfully contested removal?

2. In the absence of subject matter jurisdiction, is it appropriate, reasonable, and within a federal court's discretion under its inherent power, or under Rule 11, F.R.Civ.P., to award attorney's fees of $19,307.00 to an $8 billion corporate defendant that wrongly removed the case from a state court, against a plaintiff with assets of less than $21,000.00, who successfully contested removal?

3. Is a party liable for attorney's fees awarded because of his lawyer's purported Rule 11 violations, if he did not sign the pleadings or participate in other alleged misconduct for which his lawyer was sanctioned?

LIST OF ALL PARTIES

Petitioner Donald J. Willy was the plaintiff in the district court and the appellant in the court of appeals.

The respondents in this Court, defendants in the district court, and appellees in the court of appeals are the Coastal Corporation, Coastal States Management Company, James R. Paul, George L. Brundrett, Charles F. Jones, William L. Dunker, and E. C. (Bud) Simpson.

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OPINIONS BELOW

The district court's opinion on the merits, following Coastal's improvident removal of the case from a Texas state court, is reproduced in the appendix at page A-1. *Willy v. Coastal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986). The district court's initial unreported order, awarding attorney's fees of $22,625.00 against Petitioner and his lawyer as a sanction under Rule 11, F.R.Civ.P., is reproduced at page A-6.

The Fifth Circuit's first opinion, *Willy v. Coastal Corp.*, 855 F.2d 1160 (5 Cir. 1988), reversing the district court's decision on the merits for lack of Article III subject matter jurisdiction, reversing the Rule 11 sanctions order, and remanding the case for reconsideration in light of the intervening *en banc* decision in *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5 Cir. 1988), is reproduced at page A-9.

The district court's second unreported order, awarding attorney's fees of $19,307.00 against Petitioner and his lawyer as a Rule 11 sanction, is reproduced at page A-40. The Fifth Circuit's second opinion, *Willy v. Coastal Corp.*, 915 F.2d 965 (5 Cir. 1990), summarily affirming the sanctions award on the briefs, without oral argument, is reproduced at page A-48.

JURISDICTION

The opinion and judgment of the court of appeals, reproduced in the appendix at pages A-48 and A-56, were entered on October 26, 1990. Petitioner was granted a timely extension within which to file a petition for panel rehearing and suggestion for rehearing *en banc*, which were timely filed on November 14, 1990.

The Fifth Circuit's order denying the petition for panel rehearing and suggestion for rehearing *en banc*, reproduced in the appendix at page A-56, was entered on November 27, 1990. This petition for certiorari was filed with the Clerk of this Court within 90 days thereafter and is timely.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS

The relevant provisions of Article III of the Constitution of the United States, of Title 28 of the United States Code, and of Rule 11, F.R.Civ.P., are reproduced in the appendix beginning at page A-57.

STATEMENT OF THE CASE

Petitioner Donald J. Willy, a Houston attorney hired in 1981 as in-house environmental counsel by a subsidiary of the Coastal Corporation, was fired in 1984. In 1985, represented by George A. Young, another Houston lawyer, Willy sued Coastal and others ("Coastal") in a Texas state court, alleging that the company terminated his employment because of his refusal to violate the criminal provisions of state and federal environmental statutes and federal securities laws. The state court petition [R. 7: 1096] alleged only state causes of action and sought damages and other relief exclusively under Texas law. None of Willy's claims arose under or was created by a federal statute, and he did not allege entitlement to any federal remedy.

Coastal wrongly removed the case to the United States district court in Houston, mistakenly claiming that resolution of the controversy would require "significant

interpretation and application" of federal environmental and securities statutes, and that federal law therefore was "an essential and necessary element" of Willy's state law cause of action, conferring original federal question jurisdiction [R. 7: 1092, 1093]. Young promptly filed a motion to remand the case to the state court, on the grounds that no federal question was presented, that there was no diversity of citizenship, and that the federal district court lacked subject matter jurisdiction [R. 7: 1049].

Before any supposedly sanctionable misconduct occurred, the district court mistakenly denied the motion to remand [R. 6: 877]. Two subsequent requests by Willy's counsel to return the case to the state court for lack of subject matter jurisdiction also were erroneously rejected [R. 4: 469-70; R. 9: 5-6].

Coastal then filed a motion to dismiss Willy's principal state law claim on its merits [R. 6: 779]. Young responded by filing a reply to Coastal's motion to dismiss [R. 5: 567], a six-page motion for partial summary judgment, supported by Willy's 12-page affidavit, and a 110-page supporting brief [1] [R. 5: 609; R. 6: 744], addressed principally to Coastal's 14 defenses and a counterclaim [R. 7: 1059]. Young also sought permission to file in support of his partial summary judgment motion approximately 1,200 pages of documents Coastal produced during discovery in an earlier administrative proceeding Willy had initiated against the company in the

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[1] The court of appeals mistakenly refers to a nonexistent "110-page motion for summary judgment," at one point mischaracterizing the document as "the infamous 110-page summary judgment motion." 915 F.2d at 966 n. 3 and 968 [A-49, 54, 55].

United States Department of Labor [R. 5: 565; R. 6: 742]. The district court granted permission for Young to file the documents [R. 4: 527; R. 9: 38].

Coastal filed a response to the motion for partial summary judgment, demanding Rule 11 sanctions on the grounds that there was "no evidence to support the summary judgment" and that the motion was "unwarranted and wholly inadequate" [R. 4: 544]. Coastal filed a supplemental response and brief supporting its request for sanctions, setting out what it regarded as inappropriate behavior by Young and attributing his actions to Willy [R. 4: 485; 512].[2]

In its published memorandum and order, *Willy v. Coastal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986) [A-1], the district court mistakenly declined to reexamine its own subject matter jurisdiction, erroneously rejected on its merits Willy's principal state-law claim, and granted Coastal's motion to dismiss the remainder of the case. In an unpublished order [A-6] the court also granted Coastal's motion for Rule 11 sanctions and awarded attorney's fees of $22,625.00 against both Willy and Young, jointly and severally. The order attributed personal responsibility to Willy for Young's pleadings, although he did not sign them, and for all of Young's other supposed misconduct.[3]

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[2] Although no discovery was undertaken, only two potentially dispositive motions were filed, and less than two hours of hearings were held, Coastal claimed attorney's fees and costs of more than $85,000.00 [R. 4: 427].

[3] The first order sanctioned Willy for Young's filing of the motion for partial summary judgment, the 110-page supporting brief, the 1,200 pages of documents that the district court granted permission for Young to file, and another brief misciting a provision of the Federal Rules of Evidence [R. 5: 567, 572]. Willy did not sign any of these pleadings. The district court also cited Willy's 12-page affidavit supporting the motion for partial summary judgment, believing that the affidavit failed properly to authenticate the documents.

Willy filed in the court of appeals a motion to stay the sanctions order, asserting that Young had been hospitalized in a Minnesota alcohol and drug abuse treatment facility. The Fifth Circuit denied the stay to permit the district court to consider "the health condition of Mr. Young, who, as counsel in the case appears to have been significantly responsible for incurring the Rule 11 sanctions [that are the] subject of this motion" [R. 3: 290-91].[4]

Willy then discharged Young, retained his present counsel, and appealed. The Fifth Circuit sustained Willy's contention that the district court lacked subject matter jurisdiction, reversed its mistaken decision on the merits, and directed that Willy's claims be remanded to the state court from which Coastal had improperly removed them almost three years earlier. *Willy v. Coastal Corp.*, 855 F.2d 1160 (5 Cir. 1988) [A-9, 10]. Stating that "we and the district court retain jurisdiction over the Rule 11 aspects of this case, even though we have held that removal was improper," 855 F.2d at 1172 [A-35],[5] the

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[4] Willy did not renew his application for a stay in the district court. That court was aware of Young's hospitalization after entry of the sanctions order [R. 8: 3-8].

[5] *Vatican Shrimp Co. v. Solis*, 820 F.2d 674 (5 Cir. 1987), *cert. denied* 484 U.S. 953 (1987), and *News-Texan, Inc. v. City of Garland*, 814 F.2d 216 (5 Cir. 1987), cited by the first panel to support its *dictum* that federal courts without subject

panel also reversed the Rule 11 sanctions order and remanded the case for reconsideration in light of the intervening *en banc* decision in *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5 Cir. 1988) [A-37, 38].

On remand, Willy argued that awarding attorney's fees to defendants who wrongly invoked federal subject matter jurisdiction, against a plaintiff who successfully contested that jurisdiction, was inconsistent with Rule 11 and would violate Article III of the Constitution [R. 2: 189]. Following a hearing, the district court severed the Rule 11 issues, remanded the remainder of the case to the state trial court from which Coastal had improvidently removed it more than three years earlier [R. 11: 2-4], and awarded $19,307.00 in attorney's fees to Coastal as a Rule 11 sanction against Willy and Young, jointly and severally, citing *additional* instances of purported misconduct by Young that had not been specifically mentioned in the original order 29 months earlier.[6] Both

matter jurisdiction are empowered to award attorney's fees to defendants wrongly removing cases from state courts, do not support that proposition, although the second panel thought that "this conclusion is implicit in their broader holding." 915 F.2d at 967 n. 6 [A-52]. In those cases, which decided only issues of appellate jurisdiction, Rule 11 sanctions were sought against defendants who wrongly invoked federal subject matter jurisdiction by improvidently removing cases from state courts, not against a plaintiff who successfully contested removal jurisdiction. Apparently no federal appeals court has ever previously sustained an award of attorney's fees in the circumstances of this case.

[6] The previously unremarked violations were (i) Young's inclusion in a pleading of irrelevant and inflammatory allegations that previously had been stricken; (ii) Young's filing of responses to Coastal's motion to

the second sanctions order and the Fifth Circuit's summary affirmance of it ascribed all of the purported misdeeds to "Plaintiff" or "Willy," when it was actually Young who did them.[7] Willy's timely Rule 59 motion [R. 2: 57], reurging his arguments that Article III and Rule 11 precluded the attorney's fee award, was denied without opinion by the district court almost nine months later [R. 1: 5].

Willy filed a motion to stay the second sanctions order pending appeal, asserting in an accompanying affidavit that he had assets of less than $21,000.00 [R. 2: 63, 66]. Coastal did not contest that figure but instead argued that a stay should be denied because Willy had not shown his inability to borrow the money [R. 2: 24, 27-28]. Attached to Willy's application for stay were extracts from Coastal's 1988 annual report, establishing that the company and its operating subsidiaries in that year had revenues of more than $8 billion, profits of

dismiss that were "confusing, misleading, and not reasonably based on law or fact"; (iii) Young's allegation in a pleading that Coastal's counsel were engaged in an improper conflict of interest; (iv) Young's misquotation in a pleading of a Texas disciplinary rule; (v) Young's statement in open court that he intended to depose no less than 60 individuals in connection with the case; and (vi) Young's filing on Willy's behalf of a separate federal civil action "in an effort to harass Defendants in this case" [A-43, 44].

[7] For example, the order asserts that, "in a transcribed conference occurring during the course of this action, *Plaintiff* further evidenced *his* intent to harass Defendants by stating on the record that *he* intended to depose no less than 60 individuals in connection with this matter" (emphasis added) [A-44]. Young made this statement, not Willy [R. 10: 29].

more than $718 million, net earnings of more than $157 million, and total assets of almost $8 billion [R. 2: 69-75]. The district court denied the stay without opinion [R. 1: 6].

Willy again appealed.[8] Without oral argument, the Fifth Circuit summarily affirmed the sanctions award on the briefs, concluding that the district court possessed inherent power to award attorney's fees to Coastal as a Rule 11 sanction against Willy, even though the court never possessed Article III subject matter jurisdiction over the controversy at any stage of the proceedings, and even though Coastal, rather than Willy, wrongly invoked federal jurisdiction. The panel analogized this case to *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, 110 S.Ct. 2447, 2456, 110 L.Ed.2d 359, 376 (1990), thinking it involved, not "a judgment on the merits of an action," but rather, like the imposition of costs, attorney's fees, and contempt sanctions, "the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate." 915 F.2d at 967 [A-51].[9]

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[8] Young did not appear in the district court following remand and did not appeal the second, modified sanctions order.

[9] The panel acknowledged Willy's argument that *Cooter & Gell* is not controlling because the Rule 11 attorney's fee award there was collateral to an Article III controversy over which the federal court properly exercised subject matter jurisdiction, invoked by the sanctioned attorneys, even though they dismissed the case under Rule 41(a), F.R.Civ.P., before the sanctions were imposed. Here, by contrast, the federal court never possessed Article III subject matter jurisdiction at *any* stage of the proceedings, and Willy, the sanctioned party, did not improperly invoke

The court also believed that the award of attorney's fees was not foreclosed by the defendants' wrongful removal of the action because Coastal acted in "good faith." Since there was at least "a colorable basis" for the district court's mistaken rejection of Willy's legally correct jurisdictional position, the panel reasoned that *Cooter & Gell* permits litigants and lawyers wrongly invoking federal jurisdiction to recover attorney's fees under a federal court's inherent power, even though the derelictions and award relate only to the merits of a controversy the court was never constitutionally empowered by Article III or by Congress to hear and decide in the first place. 915 F.2d at 967 and n. 7 [A-52].

Finally, affirming the "broad discretion" that *Cooter & Gell* accords to federal trial judges under Rule 11, the panel found no abuse of discretion in this case. Mistakenly stating that the first panel affirmed the original sanctions order when it actually *reversed* it,[10]

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such jurisdiction but instead repeatedly and successfully contested it. Nonetheless, the court found *Cooter & Gell's* "discussion of the collateral character of Rule 11 orders applicable in this context as well." 915 F.2d at 967 n. 5 [A-51].

[10] The first panel nullified the original sanctions order. "The sanctions order is therefore *reversed* and the matter of sanctions is remanded to the district court for further proceedings consistent with this opinion and *Thomas*." 855 F.2d at 1173 [A-38] (emphasis added). The panel's judgment recited that the sanctions order "is set aside" [R. 3: 224]. Inexplicably, the second panel held that the first panel "*affirmed* the award of Rule 11 sanctions," 915 F.2d at 966 [A-49] (emphasis added). Concluding that "we are bound by our prior decision *affirming* the district court's award of sanctions against both Willy and his attorney," 915 F.2d at

without disclosing that virtually all the supposed misbehavior attributed to Willy personally by the district court's orders and by the panel opinion had been committed by his lawyer, and without revealing that the revised sanctions order awarded attorney's fees for purported misconduct never specifically mentioned in the first order 29 months earlier, the panel summarily ratified the district court's implicit determination that, under all of the circumstances shown, the substantial monetary award favoring Coastal was appropriate and reasonable, in the sense demanded by Rule 11, and was the "least severe sanction adequate to [serve the] purpose" of the Rule. *Thomas*, 836 F.2d at 878.

Willy's petition for panel rehearing and suggestion for rehearing *en banc*, renewing his claims that the attorney's fees awarded against him were unauthorized by Rule 11 and violated Article III of the Constitution, were denied without opinion [A-56].

REASONS FOR GRANTING THE PETITION

1. The Fifth Circuit's unprecedented holding that a federal court never possessing subject matter jurisdiction has the inherent power to award attorney's fees to a defendant wrongly removing a case from a state court is in conflict with Article III of the Constitution and with decisions of this Court and other courts of appeals.

In Article III cases and controversies over which Congress has conferred the constitutional competence to

968 [A-54] (emphasis added), the court declined for that reason to consider or decide five issues presented by Willy's brief. Willy's petition for panel rehearing and suggestion for rehearing *en banc* both pointed out the error. The Fifth Circuit did not correct it.

act through a statutory grant of subject matter jurisdiction, federal courts "enjoy a zone of implied power incident to their judicial duty,"[11] including the inherent power to award attorney's fees for bad faith litigation.[12] The question here is whether a federal court is inherently empowered to award attorney's fees, in a case over which neither Article III nor Congress conferred subject matter jurisdiction, to those who wrongly removed the controversy from a state court, for time devoted to the merits of a dispute that should never have been considered or decided by a federal court in the first place. The Fifth Circuit's surprising, unprecedented answer stands squarely in conflict with Article III, with decisions of this Court and other courts of appeals, and with almost two centuries of federal judicial history.

Time and again since *Marbury v. Madison*, 1 Cranch 137 (1803), this Court's decisions have underscored the principle that questions of federal judicial power are constitutional questions, not simply procedural issues to be decided by resort to expediency, in whatever fashion

[11] *Nasco, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696, 702 (5 Cir. 1990), *cert. granted sub nom. Chambers v. Nasco, Inc.*, ___ U.S. ___, 111 S.Ct. 38, 112 L.Ed.2d 15 (1990). Although the "inherent power" issues on which the Court granted certiorari in *Chambers* resemble the questions presented here, this case presents them in an even more elementary posture. The United States district court in *Chambers* had subject matter jurisdiction, conferred by Congress, over an Article III case or controversy. The district court in this case did not.

[12] *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975); *F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974).

best promotes efficient judicial administration or convenience. The Court repeatedly has stressed the simple but profoundly important proposition that federal courts are courts of limited rather than general jurisdiction,[13] restrained in the exercise of judicial power both by Article III of the Constitution and by the legislation of Congress. *Aldinger v. Howard*, 427 U.S. 1, 15 (1976). Because it would be an unconstitutional invasion of the province reserved to state courts for federal courts to act beyond constitutional and legislative constraints, the Court has adhered rigorously to the view that limitations on federal jurisdiction "must be neither disregarded nor evaded." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). "Due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which [Congress] has defined." *Healy v. Ratta*, 292 U.S. 263, 270 (1934).[14]

The validity of a federal court's order awarding

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[13] *E.g., Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694, 701 (1982).

[14] "For that reason, every federal court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review'." *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986), quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). When a lower federal court lacks subject matter jurisdiction, this Court reviews the case "not [on] the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Corrick*, 298 U.S. 435, 440 (1936). *Cf.* Supreme Court Rule 14.1(i) ("If review of a judgment of a United States court of appeals is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance").

attorney's fees, like the validity of any of its other orders, "depends upon that court's having jurisdiction over both the subject matter and the parties."[15] Absent congressional authorization, a federal court lacking Article III subject matter jurisdiction has no inherent power to order the payment of fines, costs, fees, or expenses of litigation, even against parties wrongly invoking its jurisdiction.[16] Such an order must be reversed "in its entirety."[17]

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[15] *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694, 701-02 (1982). *Compagnie Des Bauxites* draws a bright line between personal jurisdiction over parties to a federal controversy, which implicates no Article III concerns, and subject matter jurisdiction, which does. *See also United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988).

[16] "If there were no jurisdiction, there was no power to do anything but to strike the case from the docket." *The Mayor v. Cooper*, 6 Wall. 247, 250-51 (1868); *Smyth v. Asphalt Belt Ry. Co.*, 267 U.S. 326, 330 (1925); *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 640, 642 (1923); *Citizens' Bank of Louisiana v. Cannon*, 164 U.S. 319, 324 (1896).

Even in cases within their subject matter jurisdiction, federal courts have no inherent power to award attorney's fees or costs, other than as a sanction. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987).

[17] *United States v. United Mine Workers*, 330 U.S. 258, 295 (1947) (civil contempt penalties for violation of temporary restraining order); *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76, 80 (1988) (civil contempt penalties for resistance to subpoena duces tecum in case over which district court exercised "colorable" jurisdiction); *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950) (statutory civil penalties).

Congress did not empower the federal district court to act in this case by granting subject matter jurisdiction. A federal statute purporting to confer such competence would have violated Article III of the Constitution, because Willy's claims arose exclusively under state law, were asserted only against Texas defendants, and did not present a federal question.

Since the Federal Rules of Civil Procedure do not confer subject matter jurisdiction on federal courts, Rule 11 itself provides no source of judicial power.[18] Nor can it be maintained plausibly that a federal court's acknowledged collateral authority to award attorney's fees in a case that was once within its Article III jurisdiction, as in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, 110 S.Ct. 2447, 2456, 110 L.Ed.2d 359, 376 (1990), encompasses the entirely different situation in which a federal court was never constitutionally empowered to act in the first place, at *any* stage of the proceedings. Like pendent or ancillary jurisdiction,[19] an exercise of federal judicial power that is collateral to a federal case, as in *Cooter & Gell*, demands *some* sort of Article III jurisdiction at *some* point in the controversy. If federal subject matter jurisdiction never existed at all, at *any* stage of the proceedings before the federal court, an award of attorney's fees cannot be "collateral" to anything that Article III permits such a court to decide.

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[18] *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370 and n. 7 (1978); *Aldinger v. Howard*, 427 U.S. 1, 8-9 (1976); Rule 82, F.R.Civ.P.

[19] *Finley v. United States*, 490 U.S. ___, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989); *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Finally, federal courts cannot invoke their acknowledged inherent power to award costs or attorney's fees, against those properly resisting the mistaken exercise of subject matter jurisdiction, when Article III competence to decide a federal case or controversy never existed at any stage of the proceedings. "The inherent powers of federal courts are those which 'are necessary to the exercise of all others'." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980), citing *United States v. Hudson*, 7 Cranch 32, 34 (1812). Inherent power under Article III "is not a broad reservoir . . ., ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function."[20] Inherent and constitutional powers are correlative. If the Constitution and Congress never authorized a federal court to act in the first place, there can be no conceivable constitutional necessity to award a money judgment against litigants properly contesting federal subject matter jurisdiction, in favor of attorneys and litigants wrongly invoking it, to compensate them for time and expense devoted to the merits of a controversy *they* were responsible for wrongly inflicting on the federal courts. When subject matter jurisdiction is lacking, and Congress has not authorized recovery of fees or costs, the appropriate course is found, not in Rule 11 or in some confected "inherent power," but in Rule 12(h)(3)[21] or in

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[20] *Nasco, Inc. v. Calcasieu Television and Radio, Inc., supra*, n. 11, 894 F.2d at 702, citing *Roadway Express v. Piper, Link v. Wabash R. Co.*, and *United States v. Hudson.*

[21] "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

28 U.S.C. § 1447(c).[22]

Because a federal court always has jurisdiction to determine its own jurisdiction, *United States v. United Mine Workers*, 330 U.S. 258 (1947), lower federal courts have held that the filing of a legally or factually baseless complaint by a plaintiff, or petition for removal by a defendant, even one so frivolous that it fails to invoke federal subject matter jurisdiction, nevertheless is sanctionable under Rule 11 as an interference with the court's "jurisdiction to determine jurisdiction," because of the unwarranted imposition on judicial time and resources that results from such a filing.[23] Moreover,

[22] "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

[23] See, e.g., *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1076-79 (7 Cir. 1987) ("silly" complaint or other improper imposition on federal court's time and resources sanctionable as interference with "jurisdiction to determine jurisdiction"); *Orange Production Credit Assn. v. Frontline Ventures Ltd.*, 792 F.2d 797, 800 (9 Cir. 1986) (filing of complaint "completely [lacking] a factual foundation for subject matter jurisdiction" sanctionable under Rule 11); *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603 (1 Cir. 1988) (groundless complaint, followed by Rule 41(a) dismissal, sanctionable as misconduct committed during consideration of jurisdiction); *News-Texan, Inc. v. City of Garland*, 814 F.2d 216 (5 Cir. 1987) ((sanctions sought against defendant wrongfully removing case from state court)); *Johnson v. Smith*, 630 F. Supp. 1 (N.D. Cal. 1986) (same); *cf. Trohimovich v. Commissioner*, 776 F.2d 873, 875 (9 Cir. 1985) (appeal dismissed for lack of jurisdiction; appellant sanctioned for abusive tactics).

Wojan v. General Motors Corp., 851 F.2d 969 (7 Cir. 1988), a pseudo-diversity case cited in the panel opinion, involved

even in the absence of a congressional grant of subject matter jurisdiction, binding federal court orders may be issued "as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter."[24] The same principle permits Congress, consistently with Article III, to authorize by statute the award of costs and attorney's fees against those wrongly invoking federal jurisdiction.[25]

But entering a money judgment *in favor of* a party that wrongly invoked federal subject matter jurisdiction, *against* a party who properly contested it, and who did nothing to impede or obstruct the determination that it was lacking, is a fundamentally different matter. Recognizing an unprecedented "inherent" constitutional power to award attorney's fees in those circumstances makes no more sense than would a statute authorizing the recovery of attorney's fees and costs *against* plaintiffs

potential obstruction of jurisdiction to determine jurisdiction because the defendant's counsel waited more than five years to apprise the district court that there was no diversity. "[W]e are stunned that GM's counsel neglected to move for dismissal within a few weeks of the filing, much less waiting five and a half years." 851 F.2d at 975. It took Willy's counsel 18 *days*, over New Year's, to move for remand [R. 7: 1049].

[24] *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79 (1988), reiterating the *Mine Workers* doctrine.

[25] See, *e.g.*, 28 U.S.C. § 1919 (authorizing "payment of just costs" in any action or suit dismissed for lack of jurisdiction); 28 U.S.C. § 1447(c) (authorizing attorney's fees and costs for wrongful removal). Of course, Congress has never authorized the recovery of fees or costs *against* parties who prevail on jurisdictional grounds.

who succeed in having cases remanded to state court for lack of Article III jurisdiction, *in favor of* defendants wrongly removing them. Like the Fifth Circuit's holding in this case, such bizarre legislation would not merely be unwise as a matter of federal judicial policy. It would violate Article III of the Constitution as well.

The Eleventh Circuit's decision in *Davis v. Cluet, Peabody & Co.*, 667 F.2d 1371 (11 Cir. 1982) stands squarely in conflict with the Fifth Circuit on this point. The plaintiffs in *Davis*, like Willy in this case, had sued their former employer in a state court although, unlike Willy, they had alleged deprivation of a federal right. Like Coastal in this case, the employer wrongly removed the case to the federal court, asserting federal question removal jurisdiction. As in this case, the federal district court erroneously concluded it had jurisdiction, mistakenly denied the plaintiffs' motion to remand the case to the state court, and then dismissed the action on its merits, as a sanction for "plaintiffs' repeated refusal to follow federal and local procedural rules and court orders" with respect to the merits of the controversy. 667 F.2d at 1372.[26]

Finding no subject matter jurisdiction because the federal question presented was insubstantial, the Eleventh Circuit first considered whether "jurisdiction to determine jurisdiction" warranted affirming the district court's sanction of dismissal on the merits, rather than directing the remand of the case to the state court:

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[26] *Davis* was decided before the 1983 amendment of Rule 11.

> At oral argument the issue was raised as to whether we might uphold the district court's dismissal of the case for plaintiffs' misfeasance, despite the absence of subject matter jurisdiction, because the court's action was not actually on the merits. Because the district court has authority to consider the case pending a determination that it lacked subject matter jurisdiction and because while it is considering the case the parties must comply with procedural rules and court orders, one might argue that a court may dismiss a suit for a party's misfeasance though it ultimately determines that subject matter jurisdiction does not exist. 667 F.2d at 1373.

Correctly recognizing the Article III implications of its decision, Judge Frank Johnson's opinion for the court rejected that argument:

> [E]ven assuming that the court only dismissed for plaintiffs' misfeasance, we could not uphold such action in the absence of subject matter jurisdiction. The major portion of plaintiffs' actions that served as the basis for the court's order occurred *after* the motion to remand was denied and *most of the actions were not connected with the dispute over subject matter jurisdiction*. We do not find it appropriate here for the district court to have imposed the sanction of dismissal, thus disposing of the proceeding, even though it had no authority to rule on the merits in the first place. Such an act would 'work a wrongful extension of federal jurisdiction and give the district courts power the Congress has denied them.' American Fire & Cas. Co. v. Finn, 341 U.S. 6, 18, 71 S.Ct. 534, 542, 95 L.Ed. 702 (1951) (reversing entry of judgment after removal by court without jurisdiction). 667 F.2d at 1373 (emphasis added; footnote omitted).

The *Davis* court emphasized the circumstance, stressed by Willy in the courts below, "that we are not dealing here with the misfeasance of a party solely involving procedures connected with a court's determination of whether it has subject matter jurisdiction. The federal courts have jurisdiction to determine whether they have jurisdiction to hear a case . . ., and therefore have authority to sanction parties for misfeasance connected with the determination of whether jurisdiction exists." 667 F.2d at 1374 n. 8.[27] Willy was not sanctioned for interfering with the district court's determination of its jurisdiction. He was sanctioned for his purported interference with an unconstitutional exercise of federal judicial power over the merits of his case, against which he repeatedly protested from the very beginning to the bitter end.

The Fifth Circuit's decision in this case stands squarely in conflict with this Court's decisions, and with the Eleventh Circuit's holding in *Davis*, on this very elementary but profoundly important point of federal constitutional law. The Court should grant certiorari to resolve the conflict. Supreme Court Rule 10.1(a).

2. This case presents substantial, recurring questions involving the interpretation and application of Rule 11 that have not been, but should be, resolved by the Court.

Rule 11 by its terms authorizes "an appropriate sanction," including an award of "reasonable" expenses and attorney's fees "incurred because of" a violation of

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[27] See, *e.g.*, *United States v. Shipp*, 203 U.S. 563, 573 (1906), cited in *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79 (1988).

the Rule, against the person signing an offending pleading, motion, or other paper, a represented party, or both. After seven years of experience, lower federal court opinions provide little definitive guidance as to when, if at all, it is appropriate and reasonable to award attorney's fees as a Rule 11 sanction against a represented party, for supposed violations attributable exclusively to the conduct of counsel.[28] The award of attorney's fees against Willy for the purported misfeasance of his lawyer thus presents important questions of federal law that have not been, but should be, decided by this Court. Supreme Rule 10.1(c).

(i) Should Rule 11 be used to reward a party's wrongful invocation of federal subject matter jurisdiction? The court of appeals thought that "[t]o effect the goals of deterrence and punishment, Rule 11 must embrace the conduct of those who resist, as well as those who invoke, federal jurisdiction." 915 F.2d at 967 [A-52]. Surely, however, the policies underlying the Rule neither require nor permit a federal court to *reward* lawyers and litigants

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[28] Compare the sanctions order and summary appellate review in this case with, *e.g.*, decisions of the Second, Tenth, and Eleventh Circuits, holding that "the sanctioning of a party requires specific findings that the party was aware of the wrongdoing" and must take into account "relative fault." *White v. General Motors Corp., Inc.*, 908 F.2d 675, 685-86 (10 Cir. 1990); *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1474-75 (2 Cir. 1988), *rev'd in part on other grounds sub nom. Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. ___, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989); *Donaldson v. Clark*, 819 F.2d 1551, 1560 (11 Cir. 1987) (en banc); see also *Eastway Construction Corp. v. City of New York*, 637 F. Supp 558, 569-70 (E.D.N.Y. 1986), *mod. on appeal*, 821 F.2d 121 (2 Cir. 1987), *cert. denied* 484 U.S. 918 (1987).

who wrongly file a jurisdictionally defective complaint or removal petition, by compensating them for fees and expenses they incur with respect to the merits of a case they have wrongly inflicted on the federal judiciary.

Such an approach is inconsistent with the Rule's primary purpose: to deter improper filings. "It is now clear that the central purpose of Rule 11 is to deter baseless filings in District Court and thus . . . streamline the administration and procedure of the federal courts." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, ___, 110 S.Ct. 2447, 2454, 110 L.Ed.2d 359, 374 (1990). The "baseless filing" that initiated this case was Coastal's own removal petition.

Rewarding lawyers and litigants who improperly invoke federal jurisdiction is essentially irrational. Although Coastal could not have prevailed in this litigation, its three lawyers were awarded more than $19,000.00 in attorney's fees for time devoted to preparing documents, conducting conferences, and attending hearings on the merits of a case that should never have been before the federal courts at all. Rather than deterring the filing of legally or factually baseless complaints and removal petitions, the Fifth Circuit's inversion of Rule 11 positively encourages them.

Moreover, Coastal's attorney's fees, in every meaningful sense, were incurred because of the company's improper imposition on the time and resources of the federal courts, as the result of the wrongful filing of its removal petition. Coastal's improvident removal of this case delayed its final disposition for years and inflicted significant harm on the federal system, on the state court, and on Willy himself.

The consequences were functionally indistinguishable from those resulting from the wrongful issuance of a federal injunction against state court proceedings.[29] More than five years after they were properly asserted in a state court, Willy's state claims still have not been resolved or even brought to trial.

(ii) Does Rule 11 permit an award of attorney's fees that effectively bankrupts a plaintiff before his claims are decided? Stressing the Rule's requirement that a sanction must be "appropriate," the Fifth Circuit said in *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 878 (5 Cir. 1988) (en banc), that "the sanction imposed should be the least severe sanction adequate to the purpose of Rule 11," and should take into account "the conduct and resources of the party to be sanctioned." 836 F.2d at 881. The district court and the court of appeals ignored those principles in this case. Faced with the uncontested fact that Young's pleadings prompted the sanctions, and that the amount of the fee award approached the value of all of Willy's assets, the Fifth Circuit treated those circumstances as irrelevant and did not mention them in its opinion.

In view of Coastal's improvident removal, and the resulting delay in the final disposition of Willy's state claims, the conduct and resources of the *defendant* are no less relevant to an informed determination of whether monetary sanctions, imposed before the case is over, are appropriate and reasonable in the sense demanded by Rule 11. Coastal's assets are approximately 400,000 times greater than Willy's. When a multi-billion dollar corporation's wrongful invocation of federal jurisdiction

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[29] See 28 U.S.C. § 2283 (the Anti-Injunction Act).

inflicts significant and unwarranted financial burdens and years of delay on a plaintiff struggling to bring his claims to trial in the proper state court, there is no persuasive justification for gratuitously stacking the deck against him all over again.

(iii) Is a plaintiff strictly, vicariously liable for attorney's fees awarded because of his lawyer's supposed Rule 11 violations? Because Willy "voluntarily chose [Young] as his representative in the action," it might be argued that "he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent . . ." *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 (1962). The district court and court of appeals apparently took that view of the case, metaphorically attributing Young's supposed misdeeds to Willy personally, as though he had actually engaged in the conduct himself, without bothering to disclose that the behavior said to have been that of "plaintiff" or "Willy" actually was the conduct of his counsel.

Such an essentially fictional approach is fundamentally at odds with the Court's decision in *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. ___, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989), establishing that Rule 11 must be read literally to prescribe a standard of personal accountability, not strict, vicarious liability. In other contexts, it may be appropriate to attribute a lawyer's procedural defaults to his client, on a theory of agency, because important governmental interests of judicial economy, finality, and the orderly administration of justice could not otherwise be served. See, *e.g.*, *Irwin*

v. Veterans Administration, ___ U.S. ___[59 U.S.L.W. 4021, 4022 December 3, 1990] (client bound by lawyer's receipt of EEOC notice of right to sue); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (client bound by lawyer's failure to object at trial); *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962) (client bound by dismissal resulting from lawyer's failure to appear before court). But holding a client strictly liable for attorney's fees supposedly generated by the objectively unreasonable behavior of his lawyer, when he was not personally involved in it, and when he may not even have been aware of it, does nothing to promote the Rule's announced objectives of deterrence and punishment. Automatically awarding attorney's fees as a Rule 11 sanction against clients does not deter or punish misbehavior by their lawyers.

Most importantly, Rule 11 focuses on the signing and filing of pleadings and other papers, rather than on an attorney's behavior generally.[30] If the client has not ratified an offending pleading or other document by signing it, he cannot be held vicariously liable under Rule 11. Adopting such a principle would be contrary to the Rule's policy of imposing strict liability and personal accountability only on the signer of a pleading, motion, or other paper.

The Court presently is considering whether, and in what circumstances, Rule 11's standard of "objective reasonableness" is applicable to litigants as well as to

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[30] Rule 11 "refers repeatedly to the signing of papers; its central feature is the certification established by the signature." *Oliveri v. Thompson*, 803 F.2d 1265, 1267 (2 Cir. 1986), *cert. denied sub nom. County of Suffolk v. Grasick*, 480 U.S. 918 (1987).

their attorneys. *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 892 F.2d 802 (9 Cir. 1989), *cert. granted* ___ U.S. ___, 110 S.Ct. 3235, 111 L.Ed.2d 746 (1990). In *Business Guides*, however, the litigant itself purportedly had violated Rule 11 on at least two occasions "by failing to conduct a reasonable factual inquiry" with respect to papers its employees had prepared and signed for filing in the case. 892 F.2d at 812.

In this case, by contrast, virtually all of the attorney's fees awarded against Willy for supposed Rule 11 violations were attributable to the pleadings and other behavior of his lawyer. Willy was held liable, not for what he did, but for what his counsel did on his behalf.

The questions raised by this case are substantial, recurring, and deserving of review by this Court. A near-impecunious plaintiff, who never wanted to be in a federal court in the first place, was illegally abducted there from a state court, kicking and screaming, by an $8 billion corporate defendant that wrongly held him hostage for more than three years. Free at last, he now has been ordered to pay a $19,307.00 ransom that effectively bankrupts him after his kidnappers, claiming *they* were harmed, "nail" him[31] for supposed misconduct, attributed to him personally by the courts below, but actually committed by his lawyer. That bizarre, unprecedented, unconscionable result is irreconcilable with Article III of the Constitution, this Court's decisions, and the holdings of other courts of appeals. It cannot conceivably be "appropriate" or "reasonable" in any sense contemplated by Federal Rule 11.

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[31] This was the district court's expression [R. 10: 21].

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Michael A. Maness
Counsel of Record
for Petitioner
1900 North Loop West
Suite 500
Houston, Texas 77018
(713) 680-9922

Donald J. WILLY, Plaintiff,

v.

The COASTAL CORPORATION, Coastal States Management Company, Inc., James R. Paul, George L. Brundrett, Charles F. Jones, William A. Dunker, and E.C. (Bud) Simpson, Defendants.

Civ. A. No. H-85-6947.

United States District Court,

S.D. Texas,

Houston Division.

Nov. 12, 1986.

MEMORANDUM AND ORDER OF DISMISSAL

HITTNER, District Judge.

Pending before the Court is Defendants' Motion to Dismiss (as to Plaintiff's alleged First Cause of Action for wrongful termination). Having considered the pleadings and the law applicable thereto, this Court is of the opinion that Defendants' Motion to Dismiss should be, and hereby is, GRANTED. It is therefore

ORDERED that Plaintiff's First Cause of Action, alleging wrongful termination, be DISMISSED pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. Furthermore, it is

ORDERED that Plaintiff's remaining pendant claims (Plaintiff's Second, Third, Fourth, and Fifth Causes of Action) be DISMISSED.

Plaintiff Willy complains via five alleged causes of action of his termination from employment as "in-house" counsel with Defendant Coastal Corporation. Willy worked for Coastal Corporation for over three years before he was fired on October 1, 1984. His legal advice concerned the company's compliance with various federal and state environmental laws.

Plaintiff's first cause of action alleges wrongful termination from his employment as an "in-house" attorney for the Defendant corporation. Plaintiff contends that he was fired because he "required the company to comply with the environmental laws. They objected to this requirement. I left the employment of the company involuntarily." Plaintiff's Petition for Removal, exhibit 1, Plaintiff's Original Petition, page 10. The Plaintiff does not allege, however, that he reported these alleged violations by his employer to any Federal Authority.[1] Nonetheless, this Court will not decide

[1] Plaintiff bases his allegations of illegal acts upon various federal statutes: the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § *9601 et seq.*; Safe Drinking Water Act, 42 U.S.C. § 201, 300f *et seq.*; the Clean Air Act, 42 U.S.C. § 7401 *et seq.*; and the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* Many of these Acts provide statutory safeguards for retaliatory discharge, a protection the Plaintiff has sought via the United States Department of Labor in Case No. 85-CAA-1. The resolution of said complaint is not under review by this Court; however, this Court acknowledges the precedential case of *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), in which the Fifth Circuit held that the retaliatory discharge protection of the Energy Reorganization Act does not protect internal activities such as disagreements over the conformance of reports with federal requirements. Absent contact with a competent organ of the government, the employee does not make out

whether the Defendant company ordered the plaintiff to commit an illegal act. The basis for dismissal rests upon another rationale.

The well-established standard to be used for dismissal for failure to state a claim upon which relief can be granted is "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). The purpose of the Rule 12(b)(6) motion to dismiss is to test the law of the alleged claim, and not the facts allegedly supporting the claim. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (1969 & Supp.1986). The law at issue in Plaintiff's claim is the law of wrongful termination as it is developing in the State of Texas.[2]

Plaintiff has asked this Court to expand the Texas exception to employment-at-will to an attorney who believes he has been asked to violate the law. Indeed, the narrow public policy exception to employment-at-will adopted in *Hauck* encourages law enforcement.[3] An

a claim intended to protect a "whistle blower." *Brown & Root, Inc.*, at 1034-36.

[2] The Texas Supreme Court has only recently acknowledged the tort of wrongful termination but the Court did so for a very limited exception to the common law doctrine of employment-at-will. The public policy exception adopted is very narrow and "governs only the discharge of an employee for the sole reason that the employee refused to perform an illegal act." *Hauck v. Sabine Pilot Services, Inc.*, 687 S.W.2d 733, 735 (Tex.1985).

[3] *Hauck*, 687 S.W.2d at 735.

attorney, as an officer of the Court, often is placed in the dilemma of serving either his client's wishes or the law's demands. As legal practitioners are no doubt aware, the line is often not clear. Under these circumstances, however, the Texas Canons of Ethics and the Disciplinary Rules are the standard for an attorney's professional conduct. If an attorney believes that his client is intent upon pursuing an illegal act, the attorney's option is to voluntarily withdraw from employment. DR 2-110(C)(1)(c). When an attorney elects not to withdraw and not to follow the client's wishes, he should not be surprised that his client no longer desires his services. Once the client does elect to terminate the relationship, however, the attorney is required *mandatorily* to withdraw from any further representation of that client. DR 2-110(B)(4). The standard is the same for an in-house attorney.[4]

There is a well-established standard for professional conduct when an attorney finds himself in the situation as described by the plaintiff. Therefore, this Court does not believe that it is necessary or proper[5] to extend the *Hauck* public policy exception and does not find a cause of action for termination of an attorney's services to be within the exception to employment-at-will adopted by

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[4] *See, e.g.*, of application of the same standards of conduct to "in-house" attorneys, *UpJohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), and *Doe v. A. Corp.*, 709 F.2d 1043 (5th Cir.1983).

[5] Prior to the Texas Supreme Court's decision in *Hauck*, the Fifth Circuit for the Federal Courts had been asked but declined to delve into making exceptions to the employment at will doctrine as it existed in the common law of Texas. *See, e.g., Claus v. Gyorkey*, 674 F.2d 427, 433 (5th Cir.1982).

the Texas Supreme Court.

Additionally, this Court declines to maintain pendant jurisdiction over the remaining state law claims which allege breach of ethical duty, invasion of privacy, intentional infliction of emotional distress, blacklisting,[6] conspiracy, and intentional interference with business and contracts. The long-standing case authority on pendant jurisdiction is *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). The general rule of *Gibbs* is to dismiss state claims, if the federal claims are dismissed before trial. *Gibbs* at 726, 86 S.Ct. at 1139, 16 L.Ed.2d at 228. In the exercise of its discretion in this area, the Court has considered the three prerequisites of *Gibbs*,[7] and finds there to have been little substance to the alleged Federal claim although sufficient to confer subject matter jurisdiction.[8] This case was originally filed in state court and removed by the Defendants based upon the assertion that the Plaintiff's

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[6] Tex.Rev.Civ.Stat.Ann. arts. 5196c and 5196d (Vernon Supp.1986).

[7] In *Gibbs*, the Supreme Court delineated three prerequisites to the exercise of pendant jurisdiction. First, "[t]he federal claim must have substance sufficient to confer subject matter jurisdiction on the court." Second, "[t]he state and federal claims must derive from a common nucleus of operative facts." Finally, the "plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding . . . " *Gibbs* at 725, 86 S.Ct. at 1138, 16 L.Ed.2d at 227. *Also see, Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1317-1320 (5th Cir.1983).

[8] The Plaintiff did object to the removal of this case from state court. However, another Judge of this Court in an order dated April 11, 1986, considered and denied that motion. This Court declines to look behind that order.

first cause of action would require, as an essential element of the action, construction or application of a federal statute. *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936). In Plaintiff's first cause of action, unlawful conduct is an essential element. *Hauck* at 735. The unlawful conduct in this case requires interpretation of several Federal statutes.[9] Therefore, dismissal of the federal claim, which is extrapolated from a state cause of action, makes dismissal of the remaining pendant claims appropriate.

(Caption Omitted)

ORDER FOR SANCTIONS

Pending before this Court is Defendants' Motion for Sanctions. Having considered the pleadings with the reams of allegedly relevant supplemental material, the oral statements made on the record at hearings on August 18, 1986, and September 15, 1986, the Defendants' affidavits for attorneys fees, the Plaintiff's (Pro Se) Response to Defendants Affidavits in Support of Sanction, and the court rules and law applicable thereto, this Court is of the opinion that Defendants' Motion for Sanctions is well advised.

Under Fed. R. Civ. P. 11, an attorney's signature on a pleading certifies that the attorney has (1) read the pleadings and other papers submitted, (2) made a reasonable inquiry of the Plaintiff's Complaint to determine if it is well grounded in fact and warranted by

[9] *Supra*, note 2.

existing law or can make a good faith argument for extension of existing law, and (3) determined that the Complaint is not made in order to harass.

Plaintiff filed this suit in an apparent attempt to establish new law, at least as to one cause of action. Under such circumstances, the Court would expect Plaintiff, an attorney himself, and his counsel, to shed what light they could upon the issue in clear focus. Among the thousands of pages of pleadings and supplemental materials, Plaintiff did not illuminate the issue with any clarity, but rather chose to create a blur of absolute confusion. When the Plaintiff's attorney signed his 110-page brief in support of a Motion for Partial Summary Judgment, he made the Rule 11 certifications to this Court. Furthermore, Plaintiff asked and received permission of this Court to file what Plaintiff's attorney certifies to be appropriate and competent summary judgment evidence. What Plaintiff's attorney filed, however, was a 1,200-page, unindexed, unnumbered, foot-high pile of material which this Court is unable, after examination, to fathom and which is determined to be a conscious and wanton affront to the judicial process, this Court, and opposing counsel. This Court finds the submission and the Plaintiff's accompanying affidavit to this Court to be irresponsible at a minimum and at worst intentionally harassing. The material is generally incompetent hearsay, supported only by the Plaintiff's own conclusions and averments. *See Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985).

Unfortunately, the transgressions do not stop here. Plaintiff's response(s) to Defendants' Motion to Dismiss are also careless and confusing. For example, at page 4 of Defendants' Response to Plaintiff's Briefs Regarding

Defendants' Motion to Dismiss, the Plaintiff relies upon Rule 503 of the Federal Rules of Evidence. At the August 18, 1986, hearing, this Court asked Plaintiff to find Federal Rule of Evidence 503. Plaintiff could not. At the September 15, 1986, hearing, Plaintiff acknowledged that Rule 503 was never adopted by the United States Supreme Court. This is but an example of Plaintiff's and Plaintiff's counsel's careless pleading and a strong indication of intentional harassment.

The Court has spent enough time on this case to be sorely concerned with the actions of the Plaintiff and Plaintiff's counsel. The conduct of this suit has been inexcusable and can hardly be seen as a good faith attempt at making new law. It is therefore

ORDERED that Defendants' Motion for Sanctions be GRANTED. Plaintiff and Plaintiff's counsel, jointly and severally, are to pay $22,625 to the Defendants for the purpose of compensating the Defendants for the attorneys fees incurred in responding to Plaintiff's improper pleadings; in particular, Plaintiff's Motion for Partial Summary Judgment and Responses to Defendants' Motion to Dismiss. The $22,625 will be tendered to Defendants' attorney-in-charge on or before December 1, 1986. Proof of payment will be filed with the Court on or before December 1, 1986.

SIGNED at Houston, Texas, on this 12th day of November, 1986.

DAVID HITTNER
United States District Judge

Donald J. WILLY, Plaintiff-Appellant,

and

George A. Young,

Respondent-Appellant,

v.

The COASTAL CORP., Coastal States Management Co., Inc., et al.,
Defendants-Appellees.

No. 86-2992.

United States Court of Appeals,
Fifth Circuit.

Sept. 29, 1988.

Appeals from the United States District Court for the Southern District of Texas.

Before GARWOOD and JONES, Circuit Judges, and HUGHES,* District Judge.

GARWOOD, Circuit Judge:

Plaintiff-appellant Donald J. Willy (Willy) brought this action in the Texas courts seeking primarily to allege a wrongful discharge claim under *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985), or some extension thereof. He also asserted other related claims (such as defamation and blacklisting) under state law. Defendants-appellees removed the case to federal court on the basis of original federal question jurisdiction under

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* District Judge of the Southern District of Texas, sitting by designation.

28 U.S.C. §§ 1331, 1441, arguing that federal issues pleaded as a part of Willy's state wrongful discharge claim made this a federal case. The district court agreed and subsequently dismissed Willy's wrongful discharge claim for failure to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(6), treated Willy's remaining claims as pendent state claims and dismissed them under *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966), and ordered Willy and his attorney to pay $22,625 in attorneys' fees to defendants as a sanction pursuant to Fed.R.Civ.P. 11. We find that the district court lacked subject matter jurisdiction over the case, and that the amount of the Rule 11 sanctions is not adequately supported by the record and should be reconsidered in light of our opinion herein and the principles announced in *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir.1988). Accordingly, we reverse and remand.

Facts and Proceedings Below

Willy is a lawyer who was employed as in-house counsel from May 1981 until he was fired in October 1984 by defendant-appellee Coastal States Management Co., a wholly-owned subsidiary of defendant-appellee The Coastal Corporation. These entities (collectively, Coastal), are involved in the oil and gas industry through other subsidiaries of The Coastal Corporation. Willy claims that he was fired because he insisted that Coastal comply with various state and federal environmental and securities laws and because he would not act in violation of those laws.

Within a month of his dismissal, Willy filed an administrative complaint against Coastal with the United

States Department of Labor pursuant to 29 C.F.R. pt. 24 (1984). He argued that by firing him Coastal had violated the "whistleblower" provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610; the Clean Air Act, 42 U.S.C. § 7622; the Solid Waste Disposal Act, 42 U.S.C. § 6971; the Water Pollution Control Act, 33 U.S.C. § 1367; the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); and the Toxic Substances Control Act, 15 U.S.C. § 2622. The Department of Labor investigated and agreed. The Administrative Law Judge (ALJ) to whom Willy's case was assigned, however, found that Willy had engaged in only intra-corporate activity, not communications with a governmental agency, and recommended dismissal of Willy's claim under *Brown & Root Inc. v. Donovan*, 747 F.2d 1029 (5th Cir.1984) (the "whistleblower" provision of the Energy Reorganization Act, 42 U.S.C. § 5851(a)(3), does not protect an employee from filing an intra-corporate quality control report). On June 4, 1987, the Secretary of Labor (Secretary) rejected the ALJ's recommendation and remanded, finding from the record that Willy had been in contact with governmental agencies, presumably federal, before he was fired. The Secretary further "held" that *Brown & Root* was incorrectly decided and that this Court should be given an opportunity to reconsider its decision in light of *Kansas Gas & Electric Co. v. Brock, 780* F.2d 1505 (10th Cir.1985), *cert. denied*, 478 U.S. *1011*, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986), and *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir.1984). The present status of Willy's administrative action is not reflected by the record or briefs.

On November 22, 1985, after the ALJ's recommendation of dismissal but before remand by the Secretary, Willy filed this action in Texas state court, naming as defendants Coastal and several individuals associated with Coastal. He asserted claims for wrongful discharge, breach of the codes of ethics of the American and Texas bar associations, invasion of privacy, defamation, blacklisting, and interference with contractual and business relationships. Although Willy's complaint does not mention case law, he obviously attempted to plead his wrongful discharge action under *Sabine Pilot*, which established a Texas common law wrongful discharge action for at-will employees who have been fired for refusing to perform an illegal act, or some extension thereof. Willy alleged that he sought to cause his employer to comply with, and that he refused to engage in activity that assertedly would violate, state and federal environmental and securities laws, specifically naming the Clean Water Act (33 U.S.C. §§ 1251, *et seq.*), the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901, *et seq.*), the Clean Air Act (42 U.S.C. §§ 7401, *et seq.*), the Safe Drinking Water Act (42 U.S.C. §§ 300f, *et seq.*), and the Solid Waste Disposal Act (42 U.S.C. §§ 6901, *et seq.*).[1]

On December 30, 1985, defendants removed the case to the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. § 1441 on the

[1] In his state court pleading, Willy alleged only the names of these statutes, and did not otherwise state in his pleading any citation for the statutes he named; we have furnished the citations appearing in parentheses in the text. We, of course, imply no pleading requirement concerning case law or statutory citations.

basis of original federal question jurisdiction under 28 U.S.C. § 1331. They contended that federal question jurisdiction appears on the face of Willy's complaint because the federal statutes that Willy claimed he was fired for refusing to violate formed a necessary element of his *Sabine Pilot*-type claim. The district court agreed and denied Willy's initial motion to remand. Willy then moved for partial summary judgment and defendants moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and for sanctions pursuant to Fed.R.Civ.P. 11. Before the district court ruled on these motions, Willy twice more unsuccessfully moved for remand. On September 17, 1986, the district court denied Willy's motion for partial summary judgment and on November 12, 1986, dismissed Willy's *Sabine Pilot*-type action pursuant to Rule 12(b)(6), dismissed Willy's remaining pendent state law claims under *Gibbs*, 647 F.Supp. 116, and imposed Rule 11 sanctions in the amount of $22,625 jointly and severally against Willy and his attorney.[2] This appeal followed.

Discussion

Because the district court dismissed Willy's complaint for failure to state a claim pursuant to Rule 12(b)(6), *see Voter Information Project, Inc. v. City of Baton Rouge*, 612 F.2d 208, 210 (5th Cir.1980), and because we look to the well-pleaded complaint to determine subject matter jurisdiction, *see, e.g., Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 2846, 77 L.Ed.2d 420 (1983), we accept as true for the

[2] After entering judgment on these orders, the district court entered a modified judgment, Fed.R.Civ.P. 60(b), that dismissed counterclaims pleaded by defendants.

purposes of this appeal Willy's factual allegations that are relevant to subject matter jurisdiction, *see Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1982). We note, however, that Willy's factual allegations are often imprecise. For instance, he discusses an episode where he sought to prevent changes in a report, but does not indicate whether the report was for purely intracorporate purposes. Similarly, a contact with a governmental agency is hinted at by a vague discussion of "actions" he took that "were the first legal step" in reporting to the Securities and Exchange Commission Coastal's noncompliance with environmental laws. Because we hold that the district court did not have subject matter jurisdiction over Willy's action under any reasonable construction of his state court pleading, we find it unnecessary to resolve these ambiguities. Thus, for purposes of this appeal, we will assume, *arguendo*, that Willy alleges that he was fired because he complied with and/or refused to violate federal and state environmental and federal securities laws and that his activities in this connection were not wholly intracorporate.[3]

I. Removal Jurisdiction

As a preliminary matter, we emphasize that the burden of establishing federal jurisdiction is placed upon the party seeking removal. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 42 S.Ct. 35, 66 L.Ed. 144 (1921). Moreover, removal jurisdiction raises significant federalism concerns, *see Merrell Dow Pharmaceuticals,*

[3] We do not, however, purport to decide these matters and in no way reach the substantive merits of Willy's claims.

Inc. v. Thompson, 478 U.S. 804, 106 S.Ct. 3229, 3233, 92 L.Ed.2d 650 (1986); *Franchise Tax Board*, 103 S.Ct. at 2846, and we must therefore strictly construe removal jurisdiction. *Shamrock Oil & Gas Corp v. Sheets*, 313 U.S. 100, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941); *Powers v. South Central United Food & Commercial Workers Unions and Employers Health & Welfare Trust*, 719 F.2d 760, 762 (5th Cir.1983); *Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir.1979).

The right to remove a case from state to federal court derives solely from the statutory grant of jurisdiction in 28 U.S.C. § 1441, which provides in relevant part:

> "(a). . . any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."[4]

See Finn v. American Fire & Cas. Co., 207 F.2d 113, 115 (5th Cir.1953), *cert. denied*, 347 U.S. 912, 74 S.Ct. 476, 98 L.Ed. 1069 (1954). Here, there is no allegation

[4] Section 1441(c) provides:

> "(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

of diversity of citizenship between the parties; therefore, the propriety of removal depends on whether the case falls within the provisions of 28 U.S.C. § 1331 that: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Section 1331 executes Article III, § 2, of the Constitution, which grants the federal courts the power to hear cases "arising under" the Constitution and federal statutes. Although section 1331 and Article III employ the same "arising under" language, the phrase does not have the same meaning in these different contexts. For constitutional purposes, the case arises under federal law whenever a federal question is an "ingredient" of the cause of action. *Osborn v. Bank of United States*, 9 Wheat. 22 U.S. 738, 822, 6 L.Ed. 204 (1824). Section 1331 "arising under" jurisdiction is more limited, however. *Merrell Dow*, 106 S.Ct. at 3232. *See Fabrique, Inc. v. Corman*, 813 F.2d 725, 725-26 (5th Cir 1987) (Supreme Court has rejected "ingredient" test for federal question jurisdiction). *See generally* 13B C. Wright, A. Miller, & C. Cooper, *Federal Practice and Procedure* § 3562 (2d ed. 1984) (hereinafter Wright & Miller).

The issue that we address in this case is whether the federal aspect of Willy's state cause of action brings his case within section 1331's "arising under" boundaries. Defining when a claim arises under federal law has drawn much attention but no simple solutions. *See Powers*, 719 F.2d at 763 & n. 1. *See also Superior Oil Co. v. Pioneer Corp.*, 706 F.2d 603, 605 (5th Cir.1983). Certainly the most often discussed feature of the "arising under" requirement, however, is the well-pleaded complaint rule: whether a claim arises under federal law must be

determined from the allegations in the well-pleaded complaint. *See generally* 13B Wright & Miller, § 3566 (2d ed. 1984). In cases removed to federal court, the plaintiff's well-pleaded complaint, not the removal petition, must establish that the case arises under federal law. *See Merrell Dow*, 106 S.Ct. at 3232; *Franchise Tax Board*, 103 S.Ct. at 2847. This rule requires the court to determine federal jurisdiction from only those allegations necessary to state a claim or, stated alternatively, a federal court does not have jurisdiction over a state law claim because of a defense that raises a federal issue, even if the plaintiff anticipates and pleads the federal issue in his complaint. *Franchise Tax Board*, 103 S.Ct. at 2846; *Gully v. First National Bank at Meridian*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908) (case brought in federal court).

A. Jurisdiction Based on Federal Preemption

Under the well-pleaded complaint rule, federal preemption is generally a defensive issue that does not authorize removal of a case to federal court.[5] *See Powers*, 719 F.2d 764-65. However, in *Avco Corp. v. Aero Lodge No. 735, Int'l Assn. of Machinists*, 390 U.S. 557, 88 S.Ct. 1235, 1237, 20 L.Ed.2d 126 (1968), the Court tersely held that because state action for breach of collective bargaining agreements were preempted by section 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. §185, the federal court had

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[5] Prior to the amendments to the removal statute in 1887, a federal defense such as preemption could be the basis for removal jurisdiction. *Caterpillar, Inc. v. Williams*, ___ U.S. ___, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318 (1987).

removal jurisdiction.[6] In *Fanchise Tax Board*, 103 S.Ct. at 2853-54, the Court subsequently explained that because "the preemptive force of § 301 is so powerful as to displace entirely" state actions for breach of a collective bargaining agreement, any such action "is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." The Court further stated: "*Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." 103 S.Ct. at 2854.

Nonetheless, *Franchise Tax Board* refused to find federal question jurisdiction based on preemption of a state tax collection action by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § *1001, et seq.* (ERISA).[7] The Court held that because the state's claims were not within the scope of section 502(a), which is ERISA's civil enforcement provision, they could not be removed to federal court. 103 S.Ct. at 2854-55. In other words, a federal action cannot be found to so completely

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[6] Although section 301 has been held to be an adequate jurisdictional grant, *see, e.g., Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 77 S.Ct. 912, 915, 1 L.Ed.2d 972 (1957), the *Avco* Court found jurisdiction for cases preempted by section 301 under 28 U.S.C. § 1337, which grants federal jurisdiction in actions "arising under any Act of Congress regulating commerce." There is no distinction, however, between "arising under" standards for section 1337 and section 1331. *See Franchise Tax Board*, 103 S.Ct. at 2845 n. 7.

[7] The Court assumed ERISA preemption, but did not actually determine that question.

displace state claims that *Avco* applies unless there would have been a federal cause of action under the preempting federal law.[8] In fact, in *Merrell Dow*, which did not directly raise federal preemption as an issue, the Court held that

> "a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.' 28 U.S.C. § 1331." 106 S.Ct. at 3237.

In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987), the Court extended the *Avco* rule to a state action that is preempted by ERISA's civil enforcement provision, section 502(a). *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) (under section 514(a), section 502(a)(1)(B) completely preempts a state common law claim for improper processing of a claim submitted to an ERISA-qualified plan). In *Taylor*, unlike *Franchise Tax Board*, the claim was within the scope of ERISA's private cause of action. Furthermore, Congress had expressed an explicit intent for actions preempted by section 502(a) to arise under federal law in a "similar fashion to those brought under section 301." 107 S.Ct. at 1547-48. Because of these two

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[8] In *Avco* the plaintiff was denied the injunctive relief that it sought because of independent limits on federal jurisdiction at that time. The *Francise Tax Board* Court reasoned that the *Avco* plaintiff nevertheless had stated a claim that arose under section 301 of the LMRA. 103 S.Ct. at 2853.

factors, the Court found that the action arose under federal law. *Id.* at 1548. *See also Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) (claim of right to possession of Indian lands asserts a purely federal right and claim therefore arises under federal law).

It is important to recognize that *Taylor* is a narrow extension of *Avco*, which itself represents a narrow exception to the rule that federal preemption is a defensive issue that does not authorize removal of a case to federal court. *Avco* was an action arising under section 301 of the LMRA. Because of the unique Congressional mandate for a uniform body of federal labor law under the LMRA, several broad preemption doctrines have evolved to protect this federal interest. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) (preemption of state substantive law, but not state court jurisdiction, in breach of duty of fair representation claim); *Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971) (jurisdiction of National Labor Relations Board over unfair labor practices preempts state and federal court jurisdiction); *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 1912-16, 85 L.Ed. 2d 206 (1985) (state tort action that is "inextricably intertwined with consideration of the terms of" a collective bargaining agreement is preempted by LMRA section 301). *But see Farmer v. United Brotherhood of Carpenters & Joiners*, 430 U.S. 290, 97 S.Ct. 1056, 1061-62, 51 L.Ed.2d 338 (1977) (discussing cases where state law is not preempted because the activity is only a "peripheral concern of the LMRA" or touches an interest "deeply rooted in local

feeling"); *Caterpillar, Inc. v. Williams*, ___ U.S. ___, 107 S.Ct. 2425, 2431, 96 L.Ed.2d 318 (1987) (section 301 does not preempt state breach of employment contract claim even though there was a collective bargaining agreement in place under which plaintiffs could have brought suit). In cases not implicating the LMRA, we have read the majority and concurring opinions in *Taylor* to require "manifest congressional intent" to make a preempted state claim removable to federal court. *See Beers v. North American Van Lines, Inc.*, 836 F.2d 910, 913 n. 3 (5th Cir.1988) (preemptive effect of Interstate Commerce Act).

Here, the federal laws[9] to which Willy explicitly refers as an aspect of his *Sabine Pilot*-type claim and the legislative history of those statutes indicate no intent, manifest or otherwise, that Avco should apply in this character of case. Thus, under *Taylor*, complete federal preemption or displacement cannot be a basis for removing Willy's case to federal court. In reaching this conclusion that complete federal preemption or displacement does not provide a basis for federal jurisdiction, we reiterate that we are not determining whether all or any of Willy's state wrongful discharge claim is preempted.[10]

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[9] Although occasionally mentioning federal securities laws, the parties have focused this appeal on the environmental laws.

[10] We note that state legislation is generally not preempted unless Congress has sufficiently evidenced (either expressly or inferentially through the comprehensiveness of the federal regulatory scheme) an intent to exclude all state regulation in the field or unless state law conflicts with federal law (either because

B. Jurisdiction Based on General "Arising Under" Principles

If complete displacement of state law cannot be the basis of federal question jurisdiction, does the presence of a federal aspect in Willy's state cause of action create federal jurisdiction? With the exception of state actions completely displaced by federal law, the plaintiff is generally "master to decide what law he will rely upon," *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 33 S.Ct. 410, 411, 57 L.Ed. 716 (1913), and he "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 107 S.Ct. at 2429 & n. 7 (1987) (footnote omitted).[11] Here, of course, Willy in part relies upon

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compliance with both is impossible or because state law stands as an obstacle to the accomplishment of the full objectives of Congress). *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984); *Osburn v. Anchor Laboratories, Inc.*, 925 F.2d 908, 911 (5th Cir.1987). The states, of course, are traditional partners with the federal government in the fields of securities and environmental regulation. And the *Sabine Pilot* remedy may sometimes in practice supplement but does not appear to directly conflict with any federal remedy. State remedies may, however, be preempted by federal ones in a given context. *See Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808 (5th Cir.1988) (Longshore and Harbor Workers' Compensation Act preempts state law claim for bad faith refusal to pay benefits due thereunder); *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir.1985) (Louisiana law claim for wrongful discharge in retaliation for claim under Longshore and Harbor Workers' Compensation Act inconsistent with section 48a thereof for purposes of the Outer Continental Shelf Lands Act).

[11] In *Caterpillar*, the Court explained that the well-pleaded complaint rule makes plaintiff the master of his claim when he wishes to avoid federal jurisdiction. 107 S.Ct. at 2429. The plaintiff's mastery over his complaint gives

federal law and the question remains whether his case therefore arises under federal law.

One answer is found in Justice Holmes' test for federal question jurisdiction: "A suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 36 S.Ct. 585, 586, 60 L.Ed. 987 (1916). Federal jurisdiction is not shown by this test, for Willy alleges an asserted cause of action created by Texas Law.

> "However, it is well settled that Justice Holmes' test is more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction. We have often held that a case 'arose under' federal law where the vindication of a right under state law necessarily turned on some construction of federal law, see, *e.g.*, *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (1921); *Hopkins v. Walker*, 244 U.S. 486, 37 S.Ct. 711, 61 L.Ed. 1270 (1917), and even the most ardent proponent of the Holmes test has admitted that

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way to the well-pleaded complaint rule when plaintiff attempts to choose a federal forum based on an anticipated federal defense. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed.2d 126 (1908). *See also Skelly Oil* Co. *v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950) (no federal jurisdiction over plaintiff's federal declaratory judgment action because federal issue would be a defense in underlying damages or injunction action); *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1179-83 (5th Cir.1984) (no federal jurisdiction for declaratory judgment as to whether federal statute preempts nonfederal claim).

it has been rejected as an exclusionary principle, see *Flournoy v. Wiener*, 321 U.S. 253, 270-272, 64 S.Ct. 548, 556-557, 88 L.Ed. 708 (1944) (Frankfurter, J., dissenting)." *Franchise Tax Board*, 103 S.Ct. at 2846.

Following *Franchise Tax Board*, we addressed federal question jurisdiction premised on vindication of a state right that "necessarily turned on some construction of federal law." In *Oliver v. Trunkline Gas Co.*, 796 F.2d 86, 88-89 (5th Cir.1986) (on petition for rehearing), we discussed the two cases cited in *Franchise Tax Board* for this proposition, *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (1921), and *Hopkins v. Walker*, 244 U.S. 486, 37 S.Ct. 711, 61 L.Ed. 1270 (1917). We read *Hopkins*, a suit to remove a cloud from title originating in a federal patent, as distinguishable from a seemingly inconsistent decision in a quiet title action, *Barney v. Kunkel*, 264 U.S. 16, 44 S.Ct. 254, 68 L.Ed. 539 (1924), based on traditional distinctions in the pleading requirements for these two actions. We thus found *Hopkins* to have "narrow" applicability. We read *Smith*, a shareholder suit to enjoin investment in bonds allegedly issued under an unconstitutional federal act, as irreconcilable with *Moore v. Chesapeake & Ohio Railway*, 291 U.S. 205, 54 S.Ct. 402, 78 L.Ed. 755 (1934). We found it unnecessary to resolve this dilemma, however, because in neither case did federal law provide a private remedy, and the recently rendered majority opinion in *Merrell Dow*, 106 S.Ct. 3229, required a federal remedy for the statute to be a basis for federal jurisdiction. The *Merrell Dow* Court found *Smith* and *Moore* reconcilable based on the "difference in the nature of the federal issues at stake."

106 S.Ct. at 3236 n. 12. *Merrell Dow* suggested that *Smith* challenged the constitutionality of an important federal statute, whereas *Moore* was simply a state tort action that incorporated a federal standard. *Merrell Dow*, 106 S.Ct. at 3236 n. 12.

Justice Cardozo formulated the other well-recognized test for determining when an action arises under federal law: "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action . . . [and] must be such that it will be supported if the Constitution or laws of the United States are given one construction of effect, and defeated if they receive another." *Gully*, 57 S.Ct. at 97. In *Franchise Tax Board*, the Court then explained that the Holmes and Cardozo tests are alternative analyses, though the Court slightly altered the Cardozo essential element language and instead required the well-pleaded complaint to require "resolution of a substantial question of federal law." 103 S.Ct at 2848, 2856. *See also Fabrique, Inc.*, 813 F.2d at 726.

Defendants argue that the federal statutes to which Willy refers as a feature of his claim raise a substantial issue of federal law, as demonstrated by the private, federal remedy granted by those statutes. However, *Franchise Tax Board* only held that a case *might* arise under federal law when a state claim requires resolution of a substantial question of federal law, and we have interpreted the substantial question test to be a "narrow exception" to the rule that a suit "arises under the law that creates the cause of action." Oliver, 796 F.2d at 88. *Merrell Dow* recognizes "that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction" and

cites with approval the passage from Justice Frankfurter's dissenting opinion in *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 928, 1 L.Ed.2d 972 (1957), defining the proper test as "the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote." *Merrell Dow*, 106 S.Ct. at 3235 & n. 11. While *Merrell Dow* held that a private, federal remedy was a necessary predicate to determining that the presence of a federal element in a state-created cause of action resulted in that cause of action being one which arose under federal law, it did not hold that the presence of any private, federal remedy would in all instances suffice for that purpose. See *Merrell Dow*, 106 S.Ct. at 3232 (no "single, precise definition" of section 1331 "arising under" jurisdiction), 3235 ("[f]ar from creating some kind of automatic test, *Franchise Tax Board* thus candidly recognized the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction.").

Finally, because *Merrell Dow*, 106 S.Ct. at 3235, and *Franchise Tax Board*, 103 S.Ct. at 2852, relied heavily upon *Gully*, we return in conclusion to its frequently cited passage:

> "What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end . . . . Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow

> the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by." 57 S.Ct. at 100.

Cf. Belknap, Inc. v. Hale, 463 U.S. 491, 103 S.Ct. 3172, 3177, 77 L.Ed.2d 798 (1983) (LMRA does not preempt state law where claim only of peripheral concern to LMRA and deeply rooted in local law); *Farmer*, 97 S.Ct. at 1561-62 (same).

Turning to Willy's complaint, we begin with the minimum requirement that the federal statutes involved provide a private, federal remedy. See *Merrell Dow*, 106 S.Ct. at 3234-37; *Oliver*, 796 F.2d at 89. But Willy does not claim that defendants violated the "whistleblower" provisions of the federal statutes.[12] Instead, he pleaded that he was fired for refusing to violate, or seeking to cause his employer to comply with, state and federal reporting requirements. Defendants have not argued that Congress has provided a private, federal cause of action for violation of these federal regulations. Furthermore, the "whistleblower" provisions expressly

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[12] The parties do not contend that there is a "whistleblower" provision in the securities law and we are aware of none.

limit the remedy to an administrative claim with the Secretary; therefore, the district court could not have exercised jurisdiction over Willy's claim if he had originally brought it in federal court under those provisions. See *In re Willy*, 931 F.2d 545, 546 (5th Cir.1987). Just as it would "flout" congressional intent to allow a federal court to exercise federal question jurisdiction over a removed claim for violation of a federal statute that does not provide a private cause of action, *Merrell Dow*, 106 S.Ct. at 3234-35, it would equally flout congressional intent to give the federal court original (and hence removal) jurisdiction based on statutes that limit the federal remedy to an administrative action.[13]

Assuming, however, that the "whistleblower" provisions meet the requirements of *Merrell Dow*, the federal element in Willy's *Sabine Pilot*-type claim is not substantial enough to confer federal question jurisdiction.

We note to begin with that Willy's wrongful discharge claim[14] was predicated on his alleged attempts to cause his employer to comply with, or his refusal to violate, state as well as federal environmental laws and federal securities laws. For example, Willy alleges that he "refused to permit Defendants to continue to operate in violation of the environmental laws of the federal and

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[13] We note that if Willy's activities were wholly intracorporate, *Brown & Root* would take his *Sabine Pilot* claim outside of the scope of the whistleblower provisions. This, however, would only strengthen our conclusion that the district court lacked subject matter jurisdiction.

[14] Willy's claims other than for wrongful discharge concededly involved no federal aspect.

state governments," that had he "permitted the Defendants to continue to operate in violation of the laws and regulations of the federal and state governments, he would have been in violation of the laws of the United States and the various states, and also not in compliance with the code of ethics governing the actions of lawyers in Texas," and that his

> "actions . . . also would have required Defendant Coastal . . . to report to the U.S. Environmental Protection agency any non-compliance with the laws and regulations of that agency, and to report to the respective state environmental agencies, any failure to comply with state law and regulations. Among the state agencies to which reporting would have been required was the Texas Department of Water Resources and the Kansas Department of Health and Environment."

He further alleged that "Defendant Coastal would have been required to report these conditions to the investment public and its shareholders in its SEC Form 10K and 10Q." While Willy did not expressly allege why he was fired, the plain inference from his pleading is that he was discharged because of his refusal to violate, or his insistence that his employer comply with, state as well as federal environmental laws and federal securities laws. Willy also alleged in connection with his wrongful discharge claim:

> "A contract for employment at will under the laws of the State of Texas prohibits discharge for compliance with the laws of the United States and the various states, including the State of

> Texas. All actions relevant to this cause of action undertaken by Donald J. Willy were to comply with the laws of the United States and the various states."

Thus, Willy's wrongful discharge claim was supported by alternate theories, first that his discharge was wrongful because it was on account of his attempt to cause employer compliance with or his refusal to violate federal law, and second that it was wrongful because it was on account of his attempt to cause employer compliance with or his refusal to violate state law. Nothing in Willy's state pleading or in the Texas common law as announced in *Sabine Pilot* or otherwise indicates that the first (federal law related) theory is necessary to Willy's wrongful discharge claim or that the second (state law related) theory is not sufficient of itself and without the first theory.[15]

In its recent decision in *Christianson v. Colt Industries Operating Corp.*, ___ U.S. ___, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) the Court considered an analogous situation in determining whether a claim was one "arising under any Act of Congress relating to patents" for purposes of jurisdiction under 28 U.S.C. § 1338(a). The Court noted that resolution of this question was governed by the same principles that applied in determining

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[15] We do *not* determine that the facts pleaded by Willy are sufficient, under any theory, to state a claim under Texas law; we merely assume, *arguendo only*, that they are. Our point is that *if* they are, there is nothing in either the complaint or any Texas law source to indicate that the first (federal law related) theory is necessary to state a claim and that the second (state law related) is not alone sufficient to do so.

"arising under" jurisdiction for purposes of section 1331. *Christianson*, ___ U.S. at ___, 108 S.Ct. at 2172-74. It then announced that "a claim supported by alternative theories in the complaint may not form the basis for section 1338 jurisdiction unless patent law is essential to each of these theories," *id.*, and further explained:

> "The well-pleaded complaint rule, however, focuses on claims, not theories, see *Franchise Tax Board*, 463 U.S. at 26, and n. 29 [103 S.Ct. at 2855 and n. 29]; *Gully*, 299 U.S., at 117 [57 S.Ct. at 99-100], and just because an element that is essential to a particular theory might be governed by federal patent law does not mean that the entire monopolization claim 'arises under' patent law." *Id.* ___ U.S. at ___, 108 S.Ct. at 2175-76.

The *Christianson* Court proceeded to hold that neither of the two Sherman Act claims there involved, an attempted monopolization claim under section 2 and a group boycott claim under section 1, arose under the patent laws because "[t]he patent-law issue, while arguably necessary to at least one theory under each claim, is not necessary to the overall success of either claim." *Id.* The theory on which the plaintiff actually prevailed in the district court *was* the patent law theory as to each claim, *Id.*___ U.S. at ___, 108 S.Ct. at 2170-72, but the Court pointed out that the complaint *also* alleged alternative theories of recovery, not involving patent law, on each of the two claims. *Id.* ___ U.S. at ___, 108 S.Ct. at 2175-76. Hence, none of the claims met the section 1338 "arising under" requirement, and accordingly the suit was not one within the district court's section 1331 jurisdiction.

We conclude that the *Christianson* doctrine is properly applied to this case and results in the conclusion that Willy's wrongful discharge claim does not arise under federal law.

Our conclusion in this connection is strengthened by our view that the federal issues in Willy's claim are not ones in the forefront of the case, but are more collateral in nature, and are not substantial in relation to the claim as a whole, which is in essence one under state law. The Texas common law doctrine stated in *Sabine Pilot* is one intended to protect the rights of any employees, and whether the law that they are fired for refusing to violate is state or federal, environmental or otherwise, is wholly immaterial.[16] It is likewise immaterial to the Texas action whether the employee sought to aid a law enforcement agency or to bring to official cognizance violations committed by others. The federal "whistleblower" statutes, by contrast, promote *enforcement* of environmental laws by protecting employees who aid the government enforcement agency. Accordingly, in this Texas common law wrongful discharge case, the role of issues of federal law is more collateral than in the forefront.[17]

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[16] *Sabine Pilot* can be reasonably read as restricted to instances where the violations of law the employee refused to commit "carry criminal penalties." 687 S.W.2d at 735. But whether a wrongful discharge action of the *Sabine Pilot* variety will remain so limited by the Texas courts—a matter we do not decide—is an issue the resolution of which would not appear to be affected by whether the law in question is state or federal, environmental or otherwise.

[17] Just because a Sabine Pilot-type wrongful discharge action might lie in instances where a federal "whistleblower" administrative remedy would also be

Further, other issues of Texas law are substantially implicated in all theories of the wrongful discharge claim. In their motion to dismiss, defendants argued that Willy's ethical obligations as an attorney prohibited him from bringing this action. The Texas Code of Professional Responsibility, DR 2-110(B)(4), requires an attorney to withdraw when discharged by his client; DR 2-110(C)(1) allows an attorney to withdraw if his client intends to pursue an illegal course of action. Tex.Rev.Civ.Stat. Ann., Title 14 App., art. 12, § 8 (Vernon 1973). In either case, DR 4-101(C) prohibits an attorney from revealing confidences without permission except in limited situations not applicable here. Willy argues, on the other hand, that the attorney-client privilege does not allow Coastal to fire him illegally. Tex.Rev.Civ.Stat.Ann., Title 14 App., art. 12, § 8 (Vernon 1973). Thus, the primary legal issues in this

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available does not mean the former regulates the same subject matter as the latter. *Cf. Pilot Life Ins. Co.*, 481 U.S. 41, 107 S.Ct. 1549 at 1553-53, 95 L.Ed.2d 39 (Mississippi common law tort action for bad faith breach of contract, "the roots" of which "are firmly planted in the general principles of Mississippi tort and contract law" and under which "[a]ny breach of contract, and not merely breach of an insurance contract, may lead to liability for punitive damages," is not a law "which regulates insurance" within the exception to the preemptive provision of section 514(b)(2)(A) of ERISA "[e]ven though the Mississippi Supreme Court has identified its law of bad faith with the insurance industry"); *Mackey v. Lanier Collections Agency & Service, Inc.*, ___ U.S. ___, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988) (ERISA § 514(a) preempts Georgia statute specifically exempting from garnishment any employee benefit plan subject to ERISA, but does not preempt application of Georgia general garnishment statute to garnish benefit due employee under ERISA welfare benefit plan).

case will involve regulation of employment relationships and attorney conduct, both of which are areas deeply rooted in local interest. *See, e.g., Belknap*, 103 S.Ct. at 3183 (employment misrepresentation case). Resolution of these issues in defendants' favor could well mean that the federal issues would never arise.

We conclude that Willy's wrongful discharge claim is not one that "arises under" federal law for purposes of section 1331, and is hence not removable on that basis. We have previously concluded that possible federal preemption does not serve as a ground for removal here. There is no diversity. Accordingly, the district court erred in denying Willy's motion to remand, and the judgment below must be reversed with directions to remand the case to the state court. The only remaining issue is that of the Rule 11 sanctions against Willy and his attorney.

II. Rule 11 Sanctions

On the day that it dismissed Willy's action for failure to state a claim, the district court also awarded $22,625 in attorneys' fees to Coastal as a Rule 11 sanction. The district court viewed Willy's wrongful discharge claim as a legitimate attempt to establish new law, but found that instead of illuminating the issues, he chose to "create a blur of absolute confusion." The district court's primary concern was with a 110-page brief in support of Willy's motion for partial summary judgment. With this brief, Willy filed what the district court described as "a 1,200-page, unindexed, unnumbered, foot-high pile of material which this Court is unable, after examination, to fathom and which is determined to be a conscious and wanton affront to the judicial process, this Court, and opposing

counsel." The district court furthermore found that Willy's responses to defendants' motion to dismiss, in which Willy relied in part upon a federal rule of evidence that had not been adopted, were equally confusing. Willy argues both that sanctions were inappropriate and that the amount of the sanction was excessive.

We begin by noting that we and the district court retain jurisdiction over the Rule 11 aspect of this case, even though we have held that removal was improper. *See Vatican Shrimp Co. v. Solis*, 820 F.2d 674, 680 n. 7 (5th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 345, 98 L.Ed.2d 371 (1987); *News-Texan, Inc. v. City of Garland, Texas*, 814 F.2d 216, 21820 (5th Cir.1987). As to the propriety of the district court's Rule 11 sanctions, we are guided by our recent en banc opinion in *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 872-73 (5th Cir.1988), where we adopted an abuse of discretion standard of review. Our en banc opinion in *Thomas* was issued after the case was appealed, and the district court, of course, did not have the benefit of it when imposing sanctions. Under *Thomas*, compliance with Rule 11 is generally judged by an objective standard of reasonableness. *Id.* at 873. Once a district court finds a Rule 11 violation, it must impose *some* sanction. *Id.* at 876. The district court retains broad discretion in fashioning an "appropriate" sanction; however, the sanction imposed should be the least severe that adequately furthers the purposes of Rule 11. *Id.* at 876-78. Reasonable and appropriate expenses, including attorneys' fees, may be awarded as a Rule 11 sanction to the extent that the expenses were reasonably caused by a violation of Rule 11. *Id.* at 878. Actual expenses and attorneys' fees are not necessarily reasonable: "A party

seeking Rule 11 costs and attorney's fees has a duty to mitigate those expenses, by correlating his response, in hours and funds expended, to the merit of the claims." *Id*. at 879. Moreover, not all such expenses and fees so caused need be awarded. See *Smith International, Inc. v. Texas Commerce Bank*, 844 F.2d 1193, 1197 (5th Cir. 1988).

Here, the district court clearly did not abuse its discretion in determining that Willy had violated Rule 11. Filing mountainous piles of unorganized documents and citing to nonexistent rules of law are precisely the sort of conduct that, under the objective test of Rule 11, could lead a district court to conclude that the attorney had not made reasonable inquiry into the law or was seeking to harass or delay. And the district court pointed out that its list of conduct that violated Rule 11 was not meant to be comprehensive. As Coastal argued in its motion for sanctions below and on appeal now, Willy's briefs below contain other misleading citations of law.

Turning to the sanction imposed, we find the type of sanction appropriate but that the amount of and basis for the sanction must be reconsidered by the district court in light of the standards set out in *Thomas*. Sanctions may be awarded jointly and severally against the client and his attorney, *see Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1131 (5th Cir. 1987); *Southern Leasing Partners Ltd. v. McMullan*, 801 F.2d 783, 789 (5th Cir.1986), and a joint and several award *may* often be appropriate where, as here, the client is an attorney. Among other things, the court must determine whether its substantial award satisfied the requirement that the fees must have been reasonably incurred *as a result of* a violation of Rule 11 and in light of the duty to

mitigate. *Thomas*, 836 F.2d at 878. Defendants submitted affidavits from two law firms: one sought reimbursement for 442 hours at $100 per hour ($44,200) and $2,639 in expenses; the other firm sought reimbursement for 307 hours at $125 an hour ($38,325). Neither firm submitted sufficiently detailed information from which the district court could determine what portion of these fees and expenses were incurred because of Rule 11 violations. Nor did the district court explain how it derived from these amounts its figure of $22,625. As we stated in *Smith* International, 844 F.2d at 1197:

> "While *Thomas* adopted 'a rule . . . that does not require specific findings and conclusions by a district court in all Rule 11 cases,' nevertheless we there held that where 'the basis and justification for the trial judge's Rule 11 decision is not readily discernible' some explanation is ordinarily required, though 'the degree and extent to which specific explanation must be contained in the record will vary according with the particular circumstances of the case, including the severity of the violation, the significance of the sanctions, and the effect of the award.' *Id*. [*Thomas*] at 883. 'If the sanctions imposed are substantial in amount'—as they clearly are here—then 'appellate review of such awards will be inherently more rigorous' and 'such sanctions must be quantifiable with some precision.' *Id. [Thomas]*."

Here the sanctions are clearly substantial in amount and the district court's orders in reference to the amount thereof do not meet the foregoing requirements.

The sanctions order is therefore reversed and the matter of sanctions is remanded to the district court for further proceedings consistent with this opinion and *Thomas*.[18]

CONCLUSION

We hold that this case was improvidently removed and that the district court lacked subject matter jurisdiction over it (except as to Rule 11 sanctions). Accordingly, the judgment below is reversed and remanded to the district court with directions to remand the cause, except for the matter of sanctions, to the state court. We likewise set aside the district court's sanctions order, and that phase of the case is remanded to the district court for further proceedings consistent herewith.

REVERSED AND REMANDED.

HUGHES, District Judge, dissenting in part:

Although I join fully the jurisdictional decision and reasoning, I cannot concur in the portion of the opinion that remands the award of sanctions for further findings.

The process of imposing sanctions has three steps. First, the respondent must be given notice of the abuse for which sanctions are sought. Second, he must have an opportunity to be heard in response. Third, the abuse and the imposition must be supported by the record. The only issue here is the third step, the quantification of the monetary sanction. The majority confuse whether the record supports the findings with whether there are

[18] We also note that "Rule 11 does not apply to conduct that occurred in state court before removal." *Foval v. First National Bank of Commerce in New Orleans*, 841 F.2d 126, 130 (5th Cir.1988).

sufficient findings.

The record is not limited to the trial judge's recitations. *Ferguson v. Hill*, 846 F.2d 20 (5th Cir.1988). Failure to articulate the process of the evidence evaluation does not undermine the trial court's judgment. The quantification required some evidence and an answer finding the appropriate level of compensation. If it were a jury issue, the question on appeal would be whether the one answer had sufficient evidence in the record to support the amount.

The testimony that is in the record consists of affidavits from the defendants' lawyers describing in some detail and some generality the time and efforts expended in the whole case. The fee total was $82,575. The trial court did not accept that evidence uncritically; he obviously discounted it by about 83%, awarding $22,625. The record is more than the fee affidavits and the judge's findings. Fed.Rule of App.Pro. 10(a). We must presume that the trial court considered the course of the litigation represented by the pleadings, motions, hearings, docket entries, briefs, and other filed papers.

Although the abuses of the plaintiff and his counsel were pervasive, the record is weak on causation, but just because I would find the amount resulting from the abuses to be a lot less does not amount to an absence of either sufficiently specific findings or of evidence in the record itself. *Anderson v. City of Bessemer*, 470 U.S. 564, 576, 105 S.Ct. 1504, 1513, 84 L.Ed.2d 518 (1985).

The people on whom the sanction was imposed here were content to leave the record in the state we find it. It supports the judgment. They were under a duty to contradict the evidence of amount and to supply evidence

of justification. They did not. This case involves neither a default nor unrepresented parties, which would be instances that may require a trial or appellate judge to use a vigorous skepticism.

On appeal, our choices are limited: If we cannot hold that the value was clearly erroneous on the evidence, we are obliged to affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DONALD J. WILLY,

Plaintiff,

V. CIVIL ACTION
NO. H-85-6947

THE COASTAL
CORPORATION,
et al.,

Defendants.

ORDER FOR SANCTIONS

Pending before this Court is Defendants' Motion for Sanctions.

In December, 1985, Defendants, on the basis of federal question jurisdiction, removed to this Court an action filed by Plaintiff, Donald J. Willy. After numerous pleadings and no less than four hearings or conferences, this Court, on November 12, 1986, granted Defendants' Motion to Dismiss Plaintiff's claims of wrongful discharge. In the same Order, the Court simultaneously

dismissed Plaintiff's remaining claims for lack of pendent jurisdiction. On that same date, the Court also granted a Motion for Rule 11 Sanctions filed by Defendants. In its separate sanction order, the Court found that Plaintiff (who is himself an attorney) and his former attorney, George A. Young, had committed multiple violations of Rule 11. Examples of improper conduct cited by the Court included Plaintiff's repeated oral and written citation of a nonexistent rule of evidence, Plaintiff's filing of confusing and misleading pleadings, his misleading misquotation of an applicable disciplinary rule, and, most notably, his filing of a 120-page Motion for Summary Judgment that was accompanied by some 1200 pages of unnumbered, unindexed, and largely irrelevant documents, which were purportedly rendered admissible by a wholly inadequate affidavit. As the result of this conduct, the Court, after the receipt of a generalized statement of attorneys' fees submitted by Defendants, ordered Plaintiff and his former counsel to pay to Defendants attorneys' fees in the amount of $22,625.

Plaintiff appealed both orders of this Court to the United States Court of Appeals for the Fifth Circuit. On September 29, 1988, the Fifth Circuit issued a lengthy opinion wherein it found that this Court had lacked removal jurisdiction over Plaintiff's claims and that those claims should therefore be remanded to the state court in which they were initially filed. *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988). Notwithstanding this finding, the Fifth Circuit also concluded the following: (1) that this Court properly found that Plaintiff and his former counsel had violated Rule 11 and (2) that this Court properly imposed a joint and several award of attorneys' fees against them. *Id.* at 1172-73. The Fifth Circuit

found that the transgressions of Plaintiff and his former counsel were "precisely the sort of conduct" to which Rule 11 applies. *Id.* at 1172. The Court of Appeals further found expressly that the type of sanction imposed by this Court, *i.e.*, attorneys' fees, was appropriate in this case. *Id.* Because the Fifth Circuit was unable to discern from the record the precise calculations by which this Court reached the amount of its sanction award or the extent to which attorneys' fees were the result of Plaintiff's Rule 11 violations, the Fifth Circuit remanded the Rule 11 issue to this Court for further proceedings in accordance with the decision in *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988).[1] Thus, the only issues resubmitted to this Court for further consideration pertain to "the amount of and basis for the sanction" to be imposed. *Id.*

First, this Court will discuss "the amount of and basis for the sanction." It is noted by this Court that the Fifth Circuit did *not* rule that the amount of the sanction initially imposed by this Court was excessive or inappropriate, but directed this Court to evaluate that amount in accordance with the guidelines in *Thomas*. *Willy* at 1173. Additionally, the Fifth Circuit *did* not rule that this Court was incorrect in finding that the conduct by Willy and his counsel was an appropriate ground or basis for sanctions. *Id.* at 1172. The Circuit Court did, however, state the following: (1) that the attorneys' fees "must have been reasonably incurred *as a result of* a violation of Rule 11 and in light of the duty to mitigate" and (2) that the affidavits supporting the fees were

[1] The Honorable Lynn Hughes, sitting by designation, dissented from the remand of this Court's Rule 11 Order, and would have affirmed that Order in its entirety.

insufficient. *Id.* at 1173. Thus, this Court will examine: (1) the basis for, or causal relationship between, the fees and the sanctions to be imposed and (2) the basis or the quantification of the fees.

Under Fed.R.Civ.P. 11, an attorney's signature on a pleading, motion, or other paper certifies that the attorney has (1) read the pleadings and other papers submitted, (2) made a reasonable inquiry of the basis for the document to determine if it is well grounded in fact and if it is warranted by existing law or makes a good faith argument for the extension of existing law, and (3) determined that the document is not made in order to harass, to cause unnecessary delay, or to increase needlessly the cost of litigation. Any sanction imposed pursuant to Rule 11 should be the least severe sanction that adequately furthers the purpose of Rule 11. *Willy*, 855 F.2d at 1172 (citing *Thomas*, 836 F.2d at 876-78). "*Thomas* does not require that the 'least severe sanction' be imposed, rather that the 'least severe sanction adequate to serve the purpose' of Rule 11 be imposed." *Harmony Drilling Co. v. Kreutter*, 846 F.2d 17, 19 (5th Cir. 1988).

In addition to the violations of Rule 11 previously mentioned, Plaintiff and his counsel engaged in the following conduct that was violative of Rule 11:

a. Plaintiff reinserted in a subsequent pleading allegations which had been previously stricken by the Court as irrelevant and inflammatory;

b. Plaintiff filed responses to Defendants' Motion to Dismiss which were confusing, misleading, and not reasonably based on law or fact;

c. Plaintiff, without a reasonable basis in law or fact, asserted in a response to Defendants' Motion to Dismiss that Defendants' counsel, the law firm of Looper, Reed, Ewing & McGraw, was engaged in an improper conflict of interest;

d. in a pleading, Plaintiff misquoted Disciplinary Rule 2-110(B)(4) of the Texas Code of Professional Responsibility, and then proceeded in that pleading to discuss the Disciplinary Rule as though the language he had omitted did not exist;

e. in an effort to harass Defendants in the instant proceeding, Plaintiff filed an action against some 80 officers, directors, employees, affiliates, and attorneys of the corporate Defendants, wherein he alleged that those individuals, by engaging in the actions which are the subject of the instant proceedings had violated the Racketeering Influenced and Corrupt Organizations (RICO) Act; and

f. in a transcribed conference occurring during the course of this action, Plaintiff further evidenced his intent to harass Defendants by stating on the record that he intended to depose no less than 60 individuals in connection with this matter.

In addition, the Court finds that Plaintiff and his counsel had sufficient and repeated notice that they were acting in violation of Rule 11. Specifically, the Court finds as follows:

a. in open court on August 18, 1986, and in a

responsive pleading dated August 12, 1986, Defendants pointed out to Plaintiff and his counsel that their citation of Rule 503 of the Federal Rules of Evidence was improper;

b. in open court on August 18, 1986, and in a responsive pleading dated September 9, 1986, Defendants objected to Plaintiff's filing of the mass of exhibits that accompanied his Motion for Partial Summary judgment on the grounds that such exhibits were improper;

c. in responsive pleadings dated August 12, 1986, Defendants pointed out to Plaintiff and his counsel that their Briefs in Response to Defendants' motion to Dismiss were improper;

d. in open court on August 18, 1986, and in a responsive pleading dated August 12, 1986, Defendants pointed out to Plaintiff and his counsel that they had misquoted Disciplinary Rule 2-110 (b) (4);

e. in a responsive pleading dated August 12, 1986, Defendants pointed out to Plaintiff and his counsel that they had improperly reinterjected in a subsequent pleading language that had previously been stricken from their Complaint by this Court;

f. in a responsive pleading dated August 12, 1986, Defendants pointed out that Plaintiff and his counsel had improperly asserted that a conflict of interest existed on the part of the law firm of Looper, Reed, Ewing & McGraw;

g. by letter dated March 26, 1986, Plaintiff and

his counsel were advised that their proposed filing of an action against additional defendants, including Defendants' counsel, was improper; and

h. on several occasions, James L. Reed, counsel for Defendants, verbally advised Plaintiff's counsel that positions taken by Plaintiff, including those involving the miscitation of DR 2-110(b)(4) and Rule 503, were not well grounded.

Based upon the foregoing, the Court finds that Defendants incurred at least the following attorneys' fees as a direct and proximate result of the Rule 11 violations previously listed and that Defendants acted reasonably in attempting to mitigate expenses as the result of the Rule 11 violations :

a. The law firm of Looper, Reed, Ewing & McGraw performed work in response to Plaintiff's Rule 11 violations in the amount of at least Thirteen Thousand Ninety Dollars ($13,090).

b. The law firm of Ford & Harrison performed work in response to Plaintiff's Rule 11 violations in the amount of at least Six Thousand Two Hundred Seventeen Dollars ($6,217).

By way of comparison, Plaintiff filed an affidavit with this Court indicating he had incurred attorneys' fees in excess of Forty Thousand Dollars ($40,000) in the preparation of the Motion for Summary Judgment, Brief, and supporting documents. The sanctions which this

Court will impose will be the total of the expenses of Defendants' fees incurred as a result of the Rule 11 violations, i.e., $19,307. It is therefore

ORDERED that Defendants' Motion for Sanctions be GRANTED. Plaintiff and Plaintiff's counsel at the time, George A. Young, jointly and severally, are to pay Nineteen Thousand Three Hundred Seven Dollars ($19,307) to the Defendants for the purpose of compensating the Defendants for the attorneys' fees incurred in responding to the aforementioned Rule 11 violations. The Nineteen Thousand Three Hundred Seven Dollars ($19,307) will be tendered to Defendants' attorney-in-charge on or before May 1, 1989. Proof of payment will be filed with the Court on or before May 1, 1989.

SIGNED at Houston, Texas, on this 17th day of April, 1989.

DAVID HITTNER
United States
District Judge

Donald J. WILLY, Plaintiff-Appellant,

v.

The COASTAL CORPORATION, et al.,

Defendants-Appellees.

No. 90-2097

Summary Calendar.

United States Court of Appeals,

Fifth Circuit.

Oct. 26, 1990.

Appeal from the United States District Court for the Southern District of Texas.

Before KING, GARWOOD, and DUHE, Circuit Judges.

DUHE, Circuit Judge:

The appellant Donald Willy challenges the district court's imposition of sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. Willy contends the district court lacked jurisdiction to impose these sanctions, and that they are excessive and unreasonable. Finding no merit in these contentions, we affirm.

Facts and Proceedings Below

Willy, a Houston attorney, filed suit in state court against Coastal, his former employer, alleging that his discharge was in violation of Texas law prohibiting retaliatory firing. Coastal removed asserting that federal employment statutes constituted an essential element of Willy's claim. Willy moved to remand, challenging the basis for federal question jurisdiction. In response to

Coastal's 12(b)(6) motion to dismiss the case, Willy filed a 110-page motion for summary judgment and submitted 1200 pages of unindexed, unorganized supporting material. After two separate hearings, the district court granted Coastal's 12(b)(6) motion for dismissal of the federal claims, dismissed the state law claims for lack of pendant jurisdiction, and granted Coastal's motion for Rule 11 sanctions against Willy and his attorney.

On appeal, this court ruled that the suit was improvidently removed and remanded the matter to the state court in which the action was initially filed.[1] However, we affirmed the award of Rule 11 sanctions and remanded the case to the district court for further proceedings in accordance with this court's intervening decision in *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir.1988) (en banc).[2]

On remand, the district court concluded that Willy and his attorney should be assessed $19,307 in Rule 11 sanctions.[3] The district court further ruled that Coastal

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[1] *See, Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir.1988) *(Willy I)*.

[2] This court concluded that remand was necessary because it could not discern the basis upon which the district court had calculated the appropriate amount of sanctions.

[3] These sanctions were imposed for the filing of misleading and ill founded pleadings, the use of the discovery process to harass opposing parties, repeated references to non-existent disciplinary and evidentiary rules, baseless allegations of conflicts of interest, and the filing of the infamous 110-page summary judgment motion accompanied by reams of irrelevant and unorganized material.

and the other defendants had repeatedly notified Willy and his attorney of their transgression to no avail. Willy filed a Rule 59 motion for relief from this judgment, which was denied. This appeal followed.

Rule 11 Jurisdiction

Willy contends that because the district court lacked subject matter jurisdiction over the merits of his claim, it was similarly without jurisdiction to impose Rule 11 sanctions. He argues that Rule 11 does not confer its own jurisdiction, and federal courts possess no "inherent power" to impose sanctions when subject matter jurisdiction is lacking. We reject this argument.

As the appellant correctly notes, constitutional limitations on the exercise of federal jurisdiction can be neither "disregarded nor evaded." *Owen Equipment and Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 2403, 57 L.Ed.2d 274 (1978). However, federal courts are entitled to exercise inherent powers, those considered "necessary to the exercise of all others." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980), citing *United States v. Hudson*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812). We believe the imposition of Rule 11 sanctions, consistent with Congress' intent to streamline the administration of federal justice,[4] constitutes such an inherent power.

Although the appellant maintains that Rule 11 jurisdiction is dependent on subject matter jurisdiction, the Supreme Court in *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990),

[4] See, Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look, 104 F.R.D. 181 (1985).

the seminal case on Rule 11 sanctions, teaches otherwise. Characterizing the decision to sanction as a collateral one, the court concluded:

> Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and if so, what sanction would be appropriate.

Id. 110 S.Ct. at 2456.[5]

This circuit and others have recognized that to effectuate the goals of Rule 11, a district court must possess the authority to impose sanctions irrespective of the existence of subject matter jurisdiction. In *Vatican Shrimp Co. v. Solis*, 820 F.2d 674 (5th Cir.), *cert. den.* 484 U.S. 953, 108 S.Ct 345, 98 L.Ed.2d 371 (1987) and *News-Texan, Inc. v. Garland*, 814 F.2d 216 (5th Cir.1987), both involving improvidently removed suits, this court concluded that review of Rule 11 sanctions was available even when the district court which imposed them was without subject matter jurisdiction.[6]

[5] In *Cooter & Gell*, the specific question addressed by the court was whether voluntary dismissal under Fed.Rule.Civ.Pro. 41(a), after the filing of the offending pleading, deprived the district court of the authority to impose Rule 11 sanctions. We find, however, the court's discussion of the collateral character of Rule 11 orders applicable in this context as well.

[6] As the appellant correctly notes, both *Vatican Shrimp* and *News-Texan* addressed the jurisdiction of the appellate court to review sanctions imposed by a district court lacking subject matter jurisdiction. Although these

The appellant attempts to distinguish these cases on the basis that the sanctioned parties in each were attempting to *invoke* rather than *resist* federal jurisdiction. We find no merit in this distinction. Willy and his attorney were sanctioned for objectionable conduct which was independent of his jurisdictional posture in the case. Willy was entitled to contest removal jurisdiction to the extent a reasonable interpretation of the law allowed such a contest. However, this right did not include the authority to file misleading or incomprehensible pleadings, to use the discovery process for harassment, or to level frivolous allegations of conflicts of interest.[7] To effectuate the goals of deterrence and punishment, Rule 11 must embrace the conduct of those who resist, as well as those who invoke, federal jurisdiction.

Other circuits have adopted a similar view. In *Wojan v. General Motors Corp.*, 851 F.2d 969 (7th Cir.1988), the plaintiff invoked diversity jurisdiction. The defendant admitted diversity of citizenship in its early pleadings, but five years later asserted that diversity was lacking. After the action was dismissed, the district court concluded it

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opinions do not expressly address the propriety of the district court's Rule 11 jurisdiction, this conclusion is implicit in their broader holding.

[7] We are similarly unmoved by Willy's suggestion that any injury suffered by Coastal is the result of Coastal's decision to seek removal of this action. Essentially, Willy argues that if Coastal had not removed the case, Willy would not have had to file the offending pleadings. The district court's denial of the motion to remand indicates that there was at least a colorable basis upon which Coastal could have sought removal. We refuse to find that Coastal's good faith efforts "caused" Willy and his attorney to engage in sanctionable conduct.

had no jurisdiction to impose Rule 11 sanctions.[8] The Seventh Circuit reversed, concluding that the district court "[confused] subject matter jurisdiction with the court's inherent 'power' to engage in those judicial acts attendant to the presence of a live controversy before the court." *Id.* at 972.

In *Orange Production Credit Assoc. v. Frontline Ventures, Ltd.*, 792 F.2d 797 (9th Cir.1986), the plaintiff filed a complaint in federal court lacking a factual basis for subject matter jurisdiction. The Ninth Circuit upheld the district court's Rule 11 order ruling that "[t]he fact that the district court lacked jurisdiction to consider the merits of the case did not preclude it from imposing sanctions." *Id.* at 801, citing *Trohimovich v. Commissioner*, 776 F.2d 873, 875 (9th Cir.1985). *See also,*

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[8] The district court based its ruling on a case from this circuit, *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148 (5th Cir.1985), *affirmed*, 817 F.2d 307 (5th Cir.1987), *reversed on other grounds*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988). In that case, this court vacated a district court's Rule 11 order based upon its determination that the district court lacked subject matter jurisdiction. Although the Seventh Circuit in *Wojan* criticized this case without attempting to distinguish it, the distinction is easily made. In *Chick Kam Choo*, the plaintiffs filed a wrongful death claim in federal court, which was dismissed with prejudice for failure to state a cause of action. The plaintiffs then filed a nearly identical suit in Texas state court, which the defendants removed based on diversity. The district court granted the defendants' motion to dismiss on the basis of *res judicata* and imposed Rule 11 sanctions. This court vacated the award of sanctions because the offending conduct occurred in Texas *state* court rather than federal court. Instead of expressing an opinion on the authority of a district court to regulate conduct in its *own* arena, this decision merely prohibits the use of Rule 11 to regulate *state* court activities.

Szabo Food Service Inc. v. Canteen Corp., 823 F.2d 1073, 1077 (7th Cir.1987.) We reaffirm our conclusion in *Willy I* that the district court had jurisdiction to impose Rule 11 sanctions upon Willy and his attorney.

The Thomas *Formula*

Under the "law of the case" doctrine, a legal decision by this court is binding upon both district and appellate courts in all subsequent proceedings in the same case unless that decision is clearly erroneous. *Schexnider v. McDermott International, Inc.*, 868 F.2d 717 (5th Cir.1989); *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir.1967). Finding no clear error, we are bound by our prior decision affirming the district court's award of sanctions against both Willy and his attorney. Our review is limited to the amount of sanctions imposed under the *Thomas* criteria. We review the district court's calculations for an abuse of discretion. *Cooter & Gell, 110* S.Ct. at 2461.

The district court has broad discretion in imposing sanctions reasonably tailored to further the objectives of the rule. *Thomas*, 836 F.2d at 876-78. "Reasonableness" within the context of Rule 11 "must be considered in tandem with the rule's goals of deterrence, punishment, and compensation." *Id.* at 879. Additionally, the court must consider "the extent to which the nonviolating party's expenses and fees could have been avoided or were self-imposed." *Id.*

On remand, the district court examined both the causal relationship between Willy's conduct and the fees incurred by Coastal, as well as the amount of sanctions imposed. It found that Willy had filed confusing, misleading, and ill-founded pleadings (including the 110-

page summary judgment motion), asserted a baseless conflict of interest allegations and repeatedly misquoted Texas disciplinary and evidentiary rules. The court also found that Willy had asserted baseless RICO claims against eighty Coastal officers and employees and threatened to depose each of them in an effort to harass Coastal. The court recognized Coastal's repeated efforts, in open court and in private communications, to advise Willy and his attorney of these violations and mitigate its own expenses.

As the Supreme Court has noted, a district court is in the best position to "marshall the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11." *Cooter & Gell*, 110 S.Ct. at 2459. Our review of the record discloses ample support for the district court's conclusions. We find no abuse of discretion in the amount of sanction imposed against Willy and his attorney.

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

(Caption Omitted)

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to the defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

October 26, 1990

(Caption Omitted)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

(November 27, 1990)

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

John M. Duhe, Jr.
United States Circuit Judge

ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

TITLE 28, UNITED STATES CODE:

§ 1254. Court of appeals: certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United State have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

§ 1447. Procedure after removal generally

* * *

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

§ 1919. District courts; dismissal for lack of jurisdiction

Whenever any action or suit is dismissed in any district court or the Court of International Trade for want of jurisdiction, such court may order the payment of just costs.

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or

statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Supreme Court, U.S.
FILED
FEB 27 1991
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No. 90-1150

IN THE
Supreme Court of The United States
OCTOBER TERM, 1990

DONALD J. WILLY,

Petitioner,

versus

THE COASTAL CORPORATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

ROBERT C. DEMOSS
Counsel of Record for Respondents
9 Greenway Plaza
Room 818
Houston, TX 77046
(713) 877-6837
and
LARRY P. ELLSWORTH

February 1991

LIST OF ALL PARTIES

Petitioner Donald J. Willy was the plaintiff in the district court and the appellant in the court of appeals.

Respondents in this Court are The Coastal Corporation, Coastal States Management Corporation, James R. Paul, George L. Brundrett, Charles F. Jones, William L. Dunker, and E.C. (Bud) Simpson.

Pursuant to Supreme Court Rule 29.1, Respondents further state that Jayhawk Pipeline Corporation, Great Lakes Gas Transmission Company, and Aruba Refinery Rehabilitation Company, N.V. are non-wholly owned corporate subsidiaries of The Coastal Corporation.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In 1984, a subsidiary of The Coastal Corporation terminated the employment of in-house environmental attorney Donald J. Willy. Willy, through fellow attorney George A. Young, subsequently filed an action against the two corporate defendants and five individuals in Texas state court, alleging that the termination of his services as an attorney constituted a tortious wrongful discharge.[1] (R.7:1096). Willy's state court complaint was replete

[1]Prior to the filing of his state court action, Willy had instituted federal administrative proceedings against Coastal under the "whistleblower" provisions of a host of federal environmental statutes. *See In Re Willy*, 831 F.2d 545 (5th Cir. 1987). During the pendency of the present action, he also filed a separate federal lawsuit against Coastal and some *eighty* of its subsidiaries, directors, officers, employees, and attorneys alleging violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961-69. (R.2:84).

with references to federal environmental and securities statutes that Coastal allegedly had violated or sought to violate. (R.7: 1098, 1100-1105). Viewing those allegations as an essential and substantial element of Willy's claims, Coastal removed the action to the United States District Court for the Southern District of Texas under the authority of this Court's decision in *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). (R.7:1092). Two different judges of the district court found removal to have been proper and denied Willy's request for remand. (R.6:877;9:6).

Following removal, Willy and Young embarked upon a course of conduct that the district court ultimately characterized as "inexcusable." (R.4:382). The litany of offenses committed by Willy and Young, both of whom attended every hearing and conference, included the repeated oral and written citation of a non-existent rule of evidence (R.2:80), the deceptive misquotation and discussion of a controlling disciplinary rule (R.2:84), the filing of confusing and misleading pleadings (R.2:83), the improper assertion of conflict of interest claims against Coastal's counsel (R.2:83), the insertion in a later pleading of language previously stricken by the court as irrelevant and inflammatory (R.2:83), and, finally, the filing of a rambling 110-page brief in support of a motion for partial summary judgment (R.5:609) accompanied by some 1200 pages of unnumbered, unindexed, and largely irrelevant documents, all of which were purportedly rendered admissible by an inadequate affidavit personally signed by Willy. (Exs.,Vol.I,1). Willy was also present when Young advised the court of their intent to take sixty depositions in the case, which the trial court ultimately concluded were part of a plan of harrassment by Willy and his counsel. (R.10:29;2:84).

In an order dated November 12, 1986, the district court granted a motion by Coastal to dismiss Willy's wrongful discharge claim under Rule 12(b)(6). *See Willy v. Coastal Corp.*, 647 F. Supp. 116 (S.D.Tex. 1986) (Texas disciplinary rules require an

attorney to withdraw upon dismissal, and do not permit an action for tortious wrongful discharge). (R.3:231). On the same date, in response to a motion by Coastal, the district court also entered a separate order under Rule 11 imposing sanctions on Young and Willy in the joint and several amount of $22,625.00. (R.4:380). (A-6).[2] That order cited several examples of the Rule 11 violations that had been committed, and found Young and Willy's conduct to have been "a conscious and wanton affront to the judicial process, [the district court], and opposing counsel." (R.4:381).

Willy, through new counsel, appealed both orders of the district court to the United States Court of Appeals for the Fifth Circuit. On September 29, 1988, the Fifth Circuit, relying in large part on this Court's decision in *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986), issued a lengthy opinion wherein it concluded that the district court had lacked subject matter jurisdiction over the merits of the case. *Willy* v. *Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988). (A-9). The Fifth Circuit therefore reversed the substantive dismissal of Willy's claims and ordered those claims remanded to state court; but the Court also specifically ruled that jurisdiction over the Rule 11 aspects of the case survived despite the absence of subject matter jurisdiction over the merits of Willy's claims. Indeed, in his reply brief, Willy had conceded the existence of such jurisdiction. The Fifth Circuit further found that the actions of Young and Willy were "precisely the sort of conduct" prohibited by Rule 11, and proceeded to find the type of sanction imposed appropriate. (A-36). The court nevertheless remanded the Rule 11 aspects of the case to the district court for more specific findings as to the amount of the award in accordance with the intervening *en banc* decision in *Thomas* v. *Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988).

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[2]The designation "A- " refers to pages of the Appendix to Willy's Petition.

On remand, the district court accepted additional material from the parties and heard further oral argument pertaining to the sanction award. (R.11). On April 17, 1989, the district court issued a revised order for sanctions imposing a joint and several sanction of $19,307 against Young and Willy. (R.2:80)(A-40). The revised order contained specific findings as to the precise fees incurred by Coastal as a result of Willy's violations of Rule 11, and elaborated on the nature of those violations and on Coastal's corresponding efforts to mitigate its fees. Willy once again appealed the sanction order of the district court to the Fifth Circuit.[3]

On October 26, 1990, a new panel of the Fifth Circuit affirmed the district court's April 17, 1989 sanction award in its entirety. *Willy* v. *Coastal Corp.*, 915 F.2d 965 (5th Cir. 1990) (A-48). The court, citing this Court's decision in *Cooter & Gell* v. *Hartmarx Corp.*, ____ U.S. ____, 110 S.Ct. 2447, 100 L.Ed.2d 359 (1990), specifically ruled again that both it and the district court retained jurisdiction over the Rule 11 aspects of the case despite the absence of subject matter jurisdiction over the merits. (A-50). The Fifth Circuit deferred to the prior panel's ruling approving the type of sanction imposed, and, reviewing the findings of the district court, found "ample support" for the imposition of joint and several sanctions in the amount of $19,307. (A-54). On January 17, 1991, Willy filed a Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The jurisdictional issue raised by Willy has been resolved against him in numerous recent decisions, and there is no conflict among the circuits. The Fifth Circuit's decision follows the prior decisions of this Court and the other circuit courts in finding that

[3]The other sanctioned party, George A. Young, did not appeal.

the inherent power of a federal court to control its own proceedings by imposing Rule 11 sanctions is not dependent on subject matter jurisdiction over the merits. Moreover, a decision by the Court in this case would be of little precedential value because it would by necessity center upon the unique facts presented, which are unlikely to recur.

Rule 11 specifically permits the imposition of joint and several sanctions against both client and counsel. Neither the district court nor the Fifth Circuit abused its discretion by imposing such a sanction here because Willy, who is an experienced attorney, personally violated Rule 11 and actively supervised the Rule 11 violations of the fellow attorney who represented him. Moreover, the amount of the sanction imposed was reasonable in light of the harm caused by Willy's abusive conduct and the need to deter such conduct in the future.

REASONS FOR DENIAL OF WILLY'S PETITION

The issues presented by Willy's Petition have been definitively resolved by prior case law, which involves no conflicts among the circuits, are unlikely to recur with any frequency, and hinge primarily upon the unique facts of this case. As such, this matter does not warrant consideration by this Court.

I. The Fifth Circuit's exercise of jurisdiction over the Rule 11 aspects of this case was wholly consistent with Article III of the Constitution, the prior decisions of this Court, and the decisions of the other courts of appeals.

The Fifth Circuit correctly concluded that the district court retained jurisdiction over the Rule 11 issues arising from this case despite the absence of removal jurisdiction. Relying on *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed. 2d 488 (1980), and on this Court's recent decision in *Cooter & Gell* v. *Hartmarx Corp.*, ____ U.S. ____, 110 S.Ct. 2447, 100 L.Ed.2d

359 (1990), the Fifth Circuit concluded that the ability to impose sanctions under Rule 11 is among those inherent powers necessary to the administration of federal justice. Indeed, the drafters of the 1983 amendment to Rule 11 specifically premised the amendment upon the inherent judicial power "necessary to the exercise of all others" that was identified in *Roadway Express. See* 1983 Notes of Advisory Committee on Rules; *accord Kurkowski* v. *Volcker,* 819 F.2d 201, 203 (8th Cir. 1987) (basis for Rule 11 jurisdiction is the court's "inherent authority over the cases and parties before it").

Just this past term, this Court held in *Cooter & Gell* that the voluntary dismissal of an action pursuant to Rule 41(a) of the Federal Rules of Civil Procedure does not preclude the subsequent imposition of sanctions under Rule 11, even though the court technically loses jurisdiction over the case upon the dismissal. In so finding, the Court explained that,

> Like the imposition of costs, attorneys' fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate.

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110 S.Ct. at 2456. *See* 28 U.S.C. §1919 (providing for imposition of costs after a dismissal for want of jurisdiction); *Mashak* v. *Hacker,* 303 F.2d 526 (7th Cir. 1962) (court has jurisdiction to impose costs even absent jurisdiction to entertain the action); 18 U.S.C. §401 (criminal contempt). Under the *Cooter & Gell* rationale, the Rule 11 collateral power to sanction similarly endures regardless of the court's ultimate findings as to subject matter jurisdiction over the merits. *See Muthig* v. *Brant Point Nantucket, Inc.,* 838 F.2d 600, 604 (1st Cir. 1988) (use of the term "sanction" in Rule 11 suggests a contempt power analogy); *Schering Corp.* v. *Vitarine Pharmaceuticals, Inc.,* 889 F.2d 490, 495 (3d Cir.

1989) ("The analogy of Rule 11 sanctions to contempt proceedings is apt. Both are designed to deter misbehavior before the Court.").

As Willy's own citations indicate, the decisions of other courts of appeals and the prior decisions of the Fifth Circuit are in full accord with the decision rendered in this matter. *See, e.g., Schering Corp.* v. *Vitarine Pharmaceuticals, Inc., supra; Wojan* v. *General Motors Corp.,* 851 F.2d 969 (7th Cir. 1988); *S.A. Auto Lube, Inc.* v. *Jiffy Lube Intern., Inc.,* 842 F.2d 946 (7th Cir. 1988) (imposing Rule 11 sanctions following improper removal); *Szabo Food Service, Inc.* v. *Canteen Corp.,* 823 F.2d 1073 (7th Cir. 1987); *Vatican Shrimp Co.* v. *Solis,* 820 F.2d 674 (5th Cir.), *cert. den.* 484 U.S. 953, 108 S.Ct. 345 (1987); *News-Texan, Inc.* v. *City of Garland,* 814 F.2d 216 (5th Cir. 1987); *Kurkowski* v. *Volcker,* 819 F.2d 201 (8th Cir. 1987); *Orange Production Credit Assoc.* v. *Frontline Ventures, Ltd.,* 792 F.2d 797 (9th Cir. 1986); *Trohimovich* v. *Commissioner,* 776 F.2d 873 (9th Cir. 1985).

Willy's suggestion of a conflict among the circuits based on the Eleventh Circuit's decision in *Davis* v. *Cluet, Peabody & Co.,* 667 F.2d 1371 (11th Cir. 1982), is simply wrong. In *Davis,* the district court, citing the plaintiff's refusal to follow procedural rules and court orders as well as the "apparent merit" of the defendant's motion for summary judgment, had dismissed the plaintiff's claims. On appeal, the Eleventh Circuit reversed, concluding that the district court had lacked subject matter jurisdiction and that it was inappropriate "for the district court to have imposed the sanction of dismissal, *thus disposing of the proceeding,* even though it had no authority to rule on the merits in the first place." 667 F.2d at 1374 (emphasis added). The Eleventh Circuit further explained that,

> . . . although we realize that the court had already once taxed costs against plaintiff's counsel for their improper conduct, we believe that a remedy more appropriate than dismissal, which penalized the parties themselves, would have

> been further sanctions against counsel, which would have penalized the persons actually responsible for the improper conduct.

667 F.2d at 1374 n.9. *Davis* is thus consistent with the decisions of the Third, Fifth, Seventh, Eighth, and Ninth Circuits. It merely found inappropriate the sanction of dismissal where it constituted a judgment on the merits over which the court lacked jurisdiction. The power to impose monetary sanctions, which in no way impair claims on the merits, was upheld.

As Willy admitted below, a federal court always has "jurisdiction to determine jurisdiction." Logically, a court retains jurisdiction over all matters before it until a final resolution is made on appeal. *Schering Corp.* v. *Vitarine Pharmaceuticals, Inc.*, *supra* at 495 (court retains power to "engage in the usual judicial acts" even absent subject matter jurisdiction). Otherwise, once a district court erroneously decides a difficult issue of subject matter jurisdiction, the party opposing jurisdiction may say to the district court, "Because you have made an erroneous legal decision, I may now harass my opponent and flood your court with endless reams of factually and legally baseless pleadings, all with total immunity from Rule 11 sanctions." *See Szabo Food Service, Inc.* v. *Canteen Corp.*, 823 F.2d 1073, 1079 (7th Cir. 1987) (citing hypothetical example of an attorney punching a judge, taking a voluntary dismissal, and claiming immunity for his actions based on the court's lack of jurisdiction). Neither Congress nor the framers of the Constitution can be charged with creating such an opportunity to demean a federal court or the judicial process. To the contrary, Congress enacted the Rules Enabling Act to allow the courts to promulgate those rules necessary to control their own proceedings, and thereby to preclude the result urged by Willy. 28 U.S.C. §2071; *Zambrano* v. *City of Tustin*, 885 F.2d 1473, 1479 (9th Cir. 1989) ("The authority of a district court to sanction attorneys derives not just from an inherent *judicial*

power but from the *legislative* grant of authority to promulgate rules.").[4] The ability of a federal court to regulate the conduct of the proceedings before it does not, and cannot, depend on the jurisdictional posture of the merits of the case. "A court may have power to do some things but not others, and the use of 'lack of jurisdiction' to describe the things it may not do does not mean that the court is out of business." *Wojan* v. *General Motors Corp.*, 851 F.2d 969, 972 (7th Cir. 1988). Willy confuses subject matter jurisdiction over the merits of a case with the court's necessary and inherent power to regulate its own proceedings, as reflected in Rule 11; but his confusion is not warranted by the prior decisions of this Court or of the circuit courts. The jurisdictional issue raised by Willy has been uniformly resolved against him in numerous recent cases, and a revisitation of that issue by the Court would serve no purpose.

II. Neither the district court nor the Fifth Circuit abused its discretion by imposing joint and several monetary sanctions of $19,307 on Willy and his counsel.

A. Rule 11 specifically provides for a joint sanction against both counsel and client, and the facts of this case justified such an award.

Contrary to Willy's assertion, this case presents no issue of vicarious liability. This is not a case in which a district court imposed sanctions on an innocent or unsophisticated party based solely on the shoddy practice of his representative. *Cf. Muthig* v. *Brant Point Nantucket, Inc.*, 838 F.2d 600, 607 (1st Cir. 1988)

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[4]Taken to its extreme, Willy's argument would render constitutionally invalid many local rules, including those pertaining to the conduct of parties, counsel, or spectators in a federal courtroom, if the court is ultimately deemed to lack subject matter jurisdiction over the matter in progress. Thus, according to Willy, the enforceability of local rules prohibiting firearms or cameras in the courtroom would depend upon appellate affirmation of the court's subject matter jurisdiction.

(sanction against clients not warranted because "as non-lawyers" they did not understand claims).

Willy is an experienced practicing lawyer. He specialized in the complex field of environmental law, and, as a member of the bar, was charged with at least a basic knowledge of litigation and procedure. Willy personally attended every hearing and conference before the district court. *Cf. Greenberg* v. *Hilton Intern. Co.*, 870 F.2d 926, 939 (2d Cir. 1989) (no sanction where client lacked actual knowledge of wrongful conduct by counsel). (*E.g.*, R.10:3). Indeed, the district court found it necessary on one occasion to chastise Willy in open court because of his disruptive efforts to dictate the oral argument of the attorney who replaced Young. (R.8:5,6,8). Willy was present in court when Young announced an intention to take sixty depositions (R.10:29), and Willy does not deny that he authorized the filing of an abusive RICO action against some eighty Coastal affiliates, directors, officers, and attorneys. Moreover, Willy himself signed an affidavit that was one of the papers upon which the district court based its Rule 11 findings. (Exs., Vol.I,1).

Rule 11 specifically provides for the imposition of sanctions upon the person who signs a pleading, "a represented party, or both." As noted by the Fifth Circuit below and by the Second Circuit in *O'Malley* v. *New York City Transit Authority*, 896 F.2d 704 (2d Cir. 1990), such sanctions are particularly appropriate when the represented party is also a practicing attorney.[5] Since Willy is an experienced lawyer who closely oversaw the work of his hired counsel, this case presents no basis for reviewing the exercise of discretion by the district court, affirmed by the Fifth Circuit, in imposing joint and several liability on a client and his attorney under Rule 11.

[5]In *O'Malley*, the court stated that "[t]he circumstances here differ from the norm in that the party who instigated the action is also a practicing attorney. In view of [his] presumed familiarity with the law, very likely he is as much at fault as his attorney in bringing this groundless RICO action." 896 F.2d at 710.

B. The amount of the sanction imposed was well within the discretion of the district court.

As a secondary issue, Willy contends that the district court abused its discretion by imposing a monetary sanction in the amount of $19,307. Again, Willy's contentions focus on the unique facts of this case, and would render a decision by the Court of little precedential value.

The district court properly determined the amount of its sanction award on the basis of the amounts expended by Coastal in responding to Willy's abusive filings that violated Rule 11. This is a normal basis for calculating Rule 11 sanctions. *E.g., Thomas* v. *Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988).

Willy's repeated reference to Coastal as "an $8 billion corporation" which was being "rewarded" for mistakenly removing the case to federal court simply has no bearing on whether the amount of the sanction is appropriate to deter future abuses by Willy.[6] To hold that Coastal's understandable effort to bring to federal court a case involving numerous complex federal statutes somehow absolved Willy of all responsibility under Rule 11, and forced Coastal and the court to endure his "inexcusable" conduct without remedy, would be to ignore the deterrent purpose of the Rule. *See Cooter & Gell*, 110 S.Ct. at 2454 ("[A]ny interpretation [of Rule 11] must give effect to the rule's central goal of deterrence"). The court did not "reward" Coastal; the court punished Willy by ordering him to reimburse Coastal for the harm caused by his wrongful actions. Moreover, the district court and the Fifth Circuit understandably looked with skepticism on Willy's belated plea that the sanctions awarded would "effectively bankrupt" him. The sanction imposed was reasonable in light of the earnings potential of an experienced attorney, especially one who

[6]Willy's repeated reference to Coastal's financial status also fails to take into account the presence of the five individual defendants named by Willy.

incurred more than $40,000 in attorney's fees (A-46) solely to file the ponderous brief supporting partial summary judgment that led in part to the sanctions. *S.A. Auto Lube, Inc.*, v. *Jiffy Lube Intern, Inc.*, 131 F.R.D. 547 (N.D. Ill. 1990) (rejecting an attorney's plea that the amount of the sanction award was too high). The court below did not abuse its discretion by rejecting Willy's plea as to the respective financial positions of the parties. In any event, his assertions are too fact specific to justify review by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT C. DEMOSS
Counsel of Record
for Respondents
9 Greenway Plaza
Room 818
Houston, TX 77046
(713) 877-6837
and
LARRY P. ELLSWORTH

Supreme Court, U.S.
FILED
MAR 4 1991
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(7)

No. 90-1150

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DONALD J. WILLY,

Petitioner,

versus

THE COASTAL CORPORATION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER DONALD J. WILLY'S REPLY TO BRIEF IN OPPOSITION

Michael A. Maness
Counsel of Record
for Petitioner
1900 North Loop West
Suite 500
Houston, Texas 77018
(713) 680-9922

March 1991

6 pp

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The Court's intervening decision in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, ___ U.S. ___ (No. 89-1500, 1991 WL 21369, February 26, 1991), coupled with Coastal's misplaced reliance on the Rules Enabling Act, 28 U.S.C. § 2071 (Brief in Opposition at pp. 8-9), demonstrates convincingly that the Fifth Circuit's decision, sustaining the award of

attorney's fees to litigants and attorneys wrongly invoking federal subject matter jurisdiction, violates the Constitution of the United States.[1]

At least since *Cooke v. United States*, 267 U.S. 517 (1925), and more probably since *United States v. Hudson*, 7 Cranch 32 (1812), no rational person could doubt that the courts of the United States possess, implicitly and as an essential attribute of the federal judicial power conferred by Article III, an inherent right of self-protection. It is not specifically mentioned anywhere in the Constitution because it does not need to be. A federal court of necessity must be able to shield itself against actual or imminently threatened disruption of its proceedings or obstruction of its orders. The inherent federal criminal contempt power, arising from a principle of institutional self-preservation, does not depend for its exercise on subject matter jurisdiction. Because Willy was not adjudged in criminal contempt of the district court, he has never had occasion to argue otherwise.

Thus, Judge Easterbrook's fanciful example of the federal trial judge punched in the nose[2] has nothing to do

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[1] Coastal's opposition, like the Fifth Circuit's opinion, confuses the Rule 11 sanctioning power with the inherent power to award attorney's fees for bad-faith litigation. *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). See, *e.g.*, Brief in Opposition at p. 5 (asserting "inherent power of a federal court to control its own proceedings *by imposing Rule 11 sanctions*" (emphasis added). If Rule 11 is applicable, "inherent power" need not be invoked at all. Conversely, if Rule 11 is inapplicable, it is also irrelevant, since a federal court possessing an "inherent power" obviously needs no rule of procedure in order to exercise it.

[2] *Szabo Food Service, Inc v. Canteen Corp.*, 823 F.2d 1073, 1079 (7 Cir. 1987), cited in Brief in Opposition at p. 8.

with whether Article III permits the award of attorney's fees to parties who wrongly invoke federal subject matter jurisdiction. Federal judges who are assaulted during the performance of their judicial duties, or who have the decorum of their courts disrupted by firearms, cameras, or recording devices surreptitiously smuggled in (Brief in Opposition at p. 9, n. 4), or whose *status quo* orders are willfully disregarded by litigants while the court attempts to sift through difficult evidentiary, jurisdictional, or substantive issues,[3] are inherently empowered to deal with such calculated misconduct by means of criminal contempt sanctions.

But the inherent power to impose a criminal contempt penalty is neither the constitutional nor the functional equivalent of a power to enter a money judgment favoring one of the litigants. If a federal court turns out to lack Article III jurisdiction over a pending case, it simply does not require, as a necessary attribute of its judicial power, the additional authority to award attorney's fees to those who wrongly brought the controversy there. On the contrary, one of the principal justifications for imposing sanctions against litigants at all, as *Business Guides* recognizes, is enforcement of "the duty they owe the court system to conserve its resources and avoid unnecessary proceedings" (slip op. at 7). Awarding money to attorneys and parties who mistakenly invoke federal jurisdiction does nothing whatever to promote that objective but rather effectively undermines it. Accordingly, recognizing a supposed constitutional

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[3] *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988); *Maness v. Meyers*, 419 U.S. 449 (1975); *United States v. United Mine Workers*, 330 U.S. 258 (1947).

basis for imposing attorney's fees in such circumstances is no more "necessary" than finding an equivalent power to inflict the sanction of civil contempt.[4]

Coastal's invocation of the Rules Enabling Act (at p. 9) is totally misplaced. As the Court observed in *Business Guides*, there is "little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure . . ." and therefore falls squarely within the rule-making authority conferred by § 2071 (slip op. at 12). But that is certainly no basis for claiming that any equivalent rule could or should govern practice or procedure in cases over which neither Article III nor Congress has ever granted to a federal court the constitutional competence to act in the first place. The implicit premise of Rule 11 in particular, and of the Rules Enabling Act and the Federal Rules of Civil Procedure in general, is that they will be applied and enforced in controversies that are within the power of federal courts to consider and decide. No rules of practice are needed for cases beyond federal subject matter jurisdiction. There need only be an order of dismissal or remand.

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[4] Coastal's effort to distinguish the award of attorney's fees as a sanction in this case from the Eleventh Circuit's refusal to sustain the sanction of dismissal with prejudice on the merits in equivalent circumstances (at pp. 7-8) is unpersuasive. If a federal court is "inherently empowered" to award attorney's fees as a sanction, for purported misconduct arising from its consideration of the merits of a case over which it lacks subject matter jurisdiction, there is simply no principled reason why it should not also be able to dismiss the case with prejudice (as a sanction against a plaintiff) or strike the answer and enter a default judgment (as a sanction against a defendant).

Finally, Coastal's implication that certiorari should be denied because this case is aberrational and fact-specific is not persuasive. Refusing panel and *en banc* rehearing, the Fifth Circuit has authoritatively given to United States district courts in three states a pervasive, virtually unrestricted power to award attorney's fees in cases over which neither Article III of the Constitution nor Congress ever conferred the authority to act. That holding, with its disastrous implications for traditional principles of federalism, comity, and judicial self-restraint, is deserving of review by this Court.

The petition for certiorari should be granted.

Respectfully submitted,

Michael A. Maness
Counsel of Record
for Petitioner
1900 North Loop West
Suite 500
Houston, Texas 77018
(713) 689-9922

(3)

No. 90-1150

FILED
JUL 30 1991
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IN THE

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DONALD J. WILLY,

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JOINT APPENDIX

MICHAEL A. MANESS
Counsel of Record
for Petitioner
1900 North Loop West
Suite 500
Houston, TX 77018
(713) 680-9922

ROBERT C. DEMOSS
Counsel of Record
for Respondents
Nine Greenway Plaza
Room 818
Houston, TX 77046
(713) 877-6837

Quality Prep & Printing, 3909 Dover, Houston, Texas 77087 (713) 643-1636

PETITION FOR CERTIORARI FILED JANUARY 17, 1991
CERTIORARI GRANTED JUNE 17, 1991

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Order for Sanctions of the United States District Court for the Southern District of Texas (November 12, 1986) A-6

Opinion of the United States Court of Appeals for the Fifth Circuit (September 29, 1988) A-9

Order for Sanctions of the United States District Court for the Southern District of Texas (April 17, 1989) A-40

Opinion of the United States Court of Appeals for the Fifth Circuit (October 26, 1990) A-48

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Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc (November 27, 1990) A-56

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-85-6947

DONALD J. WILLY

VS.

THE COASTAL CORPORATION, ET AL.

Relevant Docket Entries

12-30-85	1	PETITION FOR REMOVAL, filed. (a) Original Petition (b) Citation
12-30-85	2	BOND FOR REMOVAL, filed. (Surety)
1-7-86	3	Deft's MOTION TO STRIKE, filed. db M/D Jan 27, 1986 by clerk.
1-7-86	4	Deft's MEMORANDUM OF LEGAL Authorities in support of defts' Motion to strike, filed. db
1-7-86	5	Defts' ANSWER AND COUNTERCLAIMS of the Coastal Corp and Coastal States Management Co., filed. db dkt'd 1-7-86
1-17-86		Rtn to Pltf motion to Remand, no stmt. kk

1-17-86	6	Pltf's MOTION TO REMAND, filed. tjl Dktd 1-21-86 OPPOSED m/d Feb 10, 1986 by clerk.
1-17-86	7	BRIEF IN SUPPORT of Pltf's Motion to Remand, filed. tjl Dktd 1-21-86
1-17-86	8	Pltf's REPLY to Motion to Strike, filed. tjl Dktd 1-21-86
1-17-86	9	Pltf's ANSWER to Defts Counterclaims Presenting Defenses under Rule 12(b), filed. tjl Dktd 1-22-86
1-29-86	12	AFFIDAVIT IN SUPPORT OF PLTF'S MOTION TO REMAND, filed. wl Dkt'd 1-31-86
2-3-86	13	Pltf's MOTION TO DISQUALIFY COUNSEL. filed. fs dkt'd 2-5-86 (Opposed) M/D 2-24-86 by clerk.
2-10-86	14	Deft's BRIEF IN OPPOSITION to pltf's Motion to Remand, filed. db dkt'd 2-11-86
2-24-86	15	Defts' BRIEF IN RESPONSE to Pltf's Motion to Disqualify Counsel. filed. fs dtk'd 2-26-86
3-19-86	16	Pltf's MOTION FOR PROTECTIVE ORDER, filed. jrl Dktd 3-26-86 (Opposed) M/D Apr 14, 86 by Clerk
3-19-86	17	Pltf's MOTION FOR SANCTIONS, filed. jrl (Opposed) Dktd 3-26-86 M/D Apr 14, 86 by Clerk
3-19-86	18	Pltf's SUPPLEMENTAL BRIEF, filed. jrl Dktd 3-26-86
4-7-86	19	Deft's MOTION FOR A TEMPORARY RESTRAINING ORDER and PRELIMINARY INJUNCTION, filed. db

4-7-86	20	MEMORANDUM OF LAW in support of Deft's Motion for TRO and Preliminary Injunction, filed. db
4-7-86	21	Deft's MOTION FOR PROTECTIVE ORDER and to SEAL THE RECORD, filed. db
4-8-86		Pts ntfd by t/c: TRO Hrg SET on Apr 10, 86; 9:15 a.m.MB/jrl Dktd 4-9-86
4-11-86	23	(JVS) ORDER, filed. Parties ntfd. jl Dktd 4-14-86 Order filing a Motion Conference held 4/10/86 1. Pltf's Motion to Remand is DENIED. 2. Pltf's Feb 3rd Motion to Disqualify Deft's Counsel and Mar 19th Motion for Sanctions are both DENIED. 3. Deft's Motion for a Temporary Restraining Order & Prel Injunction is DENIED. 4. Deft's Jan 7th Motion to Strike is GRANTED. 5. Pltf's Mar 29th Motion for Protective Order Deft's Apr 7th Motion for Protective Order & To Seal The Record are MOOT. Parties SHALL SUBMIT their protective order to Court for entry.
5-30-86	28	Defts' MOTION TO STAY Discovery, or in the Alternative, For a Protective Order, filed. jl M/D Jun 23, 86 By Clerk Dktd 6-2-86

6-10-86 29 Defts' MOTION TO DISMISS, filed jl
M/D Jun 30, 86 by Clerk
Dktd 6-11-86

6-10-86 30 Defts' MEMORANDUM of Law in Support of Motion to Dismiss, filed. jl
Dktd 6-11-86

6-20-86 31a Pltf's MOTION FOR PARTIAL SUMMARY JUDGMENT, filed. jl
(Opposed)
M/D Jul 15, 86 by Clerk
Dktd 7-2-86

6-20-86 32 Pltf's MOTION FOR PERMISSION TO SPECIALLY FILE SUPPORTING Documentation, filed. jl
Dktd 7-2-86

6-20-86 33 Pltf's BRIEF in Support of Partial Summary Judgment, filed. jl
Dktd 7-2-86

7-3-86 34 Pltf's REPLY BRIEF on Deft's Motion to Dismiss and SPECIAL BRIEF on Attorney-Client Obligations of Pltf., filed. jl
Dktd 7-7-86

7-8-86 Rec'd Amended certificate of Service and local Rule 14 Counsel Conference inst# 33 fwd to fileroom. sas

7-18-86 35 Pltf's MOTION TO FILE DOCUMENTS IN SUPPORT OF SUMMARY JUDGMENT filed. sas
M/D Aug 11, 1986 by clerk
Dkt'd 8-7-86

7-18-86 36 Pltf's SUPPLEMENTAL BRIEF TEXAS LAW OF EMPLOYMENT AT WILL, filed. sas
Dkt'd 8-7-86

8-7-86 Per JVS Revised Division of Business Order of 6-12-86, this case is transferred to the docket of Judge

Hittner effective 7-1-86 in order equalize cases pending among all judges. sas

8-8-86 Rec'd 4 volumes of Pltf's EVIDENCE IN SUPPORT OF SUMMARY JUDGMENT to be attached to Instrument 31a and fwd to file room. jlp

8-12-86 37 Defts RESPONSE to pltfs Motion for Partial Summary Judgment and Request for Rule 11 Sanctions, filed. mcs Dkt'd 8-13-86

8-12-86 38 Defts RESPONSE to pltf Briefs regarding defts Motion to Dismiss, filed. mcs
Dkt'd 8-13-86

8-18-86 Motion Hearing (B. Maruffi, Crt Reptr) PN/jlp
G. Young & E. Carter f/pltf; J. Reed, J.R. Hammett & R.C. DeMoss f/defts
Pltf reurged Motion to Remand - Denied
Defts Motion to Stay Discovery - Granted
Pltf's Motion for Permission to Specially File Supporting Documentation- Granted
Other outstanding motions will be considered Sept 15 @ 4:30 p.m.
parties ntfy'd

8-19-86 39 (DH) ORDER Following Conference, filed. Parties ntfd. jlp
(Ct. rptr: Betty Maruffi)

1. Deft's Motion to Dismiss is "on hold."
2. Deft's Motion to Stay Discovery is GRANTED.
3. Pltf's Motion for Partial Summary judgment is "on hold."

4. Pltf's Motion to File Documents in Support of Summary Judgment is GRANTED. (Three volumes filed and copy given to Deft.); (4 volumes with file)

Motions 1 and 3 are set for Sept 15, 1986 at 4:30 p.m. Dkt'd 8-20-86

9-5-86 40 SUPPLEMENTAL BRIEF IN SUPPORT OF DEFTS' MOTION FOR SANCTIONS, filed. jlp Dkt'd 9-10-86

9-9-86 41 SUPPLEMENTAL RESPONSE TO PLTF'S PARTIAL MOTION FOR SUMMARY JUDGMENT, filed. (with exhibits) jlp Dkt'd 9-12-86

9-17-86 43 (DH) ORDER following conf., filed. Parties ntfd. jlp
MOTIONS PENDING: (Crt. Rptr: B Maruffi)

1. Deft's Motion to Dismiss (as to cause of action on wrongful termination)
2. Pltf's Motion for Partial Summary Judgment
3. Deft's Motion for Sanctions
4. Rule 16 Scheduling Order
5. Deft's Motion to Stay Discovery Until Rulings Made on These Motions

Motion #1: Separate order to follow.

Motion #2: Plt's Motion for Partial Summary Judgment is DENIED.

Motion #3: Separate Order to follow.

Motion #4: Rule 16 Scheduling Order signed & filed.

Motion #5: Deft's Oral Motion to Stay Disc. until Rulings Made on all above-ref. motion is GRANTED.

Dkt'd 9-19-86

9-29-86 44 Pltf's RULE 52 MOTION. filed. fs dkt'd 10-1-86

10-9-86 45 PLTF'S BRIEF, filed. jlp Dkt'd 10-16-86

10-21-86 46 (DH) ORDER, filed. Parties ntfd. jlp

1. Court directs defts to submit detailed affidavits of their attnys fees & costs in defending this suit. Submissions are to be filed by close of business Oct 27, 1976.
Pltf has until close of business Nov 10, 1986 to respond

Dkt'd 10-22-86

10-27-86 47 AFFIDAVIT OF JAMES L. REED, JR., w/exhibits, filed. jlp Dkt'd 10-29-86

10-27-86 48 AFFIDAVIT OF ROBERT C. DeMOSS, filed. jlp Dkt'd 10-29-86

10-27-86 49 AFFIDAVIT OF J. RICHARD HAMMETT w/ attached schedule, filed. jlp Dkt'd 10-29-86

11-10-86 51 PLTF'S RESPONSE TO DEFTS AFFIDAVITS IN SUPPORT OF SANCTIONS, filed. jlp Dkt'd 11-13-86

11-10-86 52 AFFIDAVIT OF DONALD J. WILLY w/exhibits, filed. jlp Dkt'd 11-13-86

11-12-86 53 (DH) ORDER FOR SANCTIONS, filed. Parties ntfd. PN/jlp

1. Deft's Motion for Sanctions be GRANTED. Pltf & pltf's counsel, jointly & severally, are to pay $22,625 to defts for purpose of compensating the defts for the attnys fees incurred in responding to pltf's improper pleadings; in particular, pltf's motion for partial summary judgment & response to defts' motion to dismiss. The $22,625 will be tendered to defts attny-in-charge on or before Dec 1, 1986. Proof of pymt will be filed w/court on or before Dec 1, 1986. Dkt'd 11-13-86

11-12-86 54 (DH) MEMORANDUM AND ORDER OF DISMISSAL, filed. Parties ntfd.

1. Pltf's first cause of action, alleging wrongful termination, be DISMISSED pursuant to F.R.C.P. 12(b)6 for failure to state a claim upon which relief can be granted.

2. Pltf's remaining pendant claims (pltf's second, third, fourth, & fifth cause of action) be DISMISSED. PN/jlp Dkt'd 11-13-86

11-12-86 55 (DH) FINAL JUDGMENT, filed. Parties ntfd. jlp

1. Judgment entered for defts in Memorandum and Order of Dismissal.

2. This is a FINAL JUDGMENT. Dkt'd 11-13-86

12-8-86 62 Pltf. NOTICE OF APPEAL to Memorandum & Order of Dismissal, Order of Sanctions and Final Judgment entered Nov 12, 1986, filed. Rec. & Dkt'd 12-9-86 mac

12-11-86 63 George A. Young, Counsel for Pltf. NOTICE OF APPEAL to Memorandum & Order of Dismissal, Order of Sanctions and Final Judgment entered Nov 12, 1986, filed. (Fees NOT Paid.) mac

1-12-87 66 Certified copy of ORDER by Court of Appeals on Dec 19, 1986 DENYING Pltfs'-Appellants Motion for stay pending appeal, filed. mac

1-20-87 69 Pltf. Donald J. Willy's MOTION to Substitute Counsel, filed. Rec. & Dkt'd 1-21-87 mac

1-20-87 70 Pltf's MOTION to Dismiss Counterclaim, filed. Rec. & Dkt'd 1-21-87 (Unopposed Motion) mac

1-22-87 72 (DH) ORDER, filed. Parties ntfd. Rec. & Dkt'd 1-23-87 mac
Pltf's Motion to Substitute counsel is GRANTED and Michael A. Maness is in charge for Pltf. in place of George A. Young, Esquire.

1-22-87 73 (DH) RULE 60(b) MODIFICATION OF JUDGMENT, filed. Parties ntfd.

1. Pltf's Unopposed Motion to Dismiss Counterclaim is DISMISSED without prejudice.

2. It is ORDERED that the FINAL JUDGMENT is MODIFIED to include the dismissal of Defts' Counterclaim. Rec. & DKt'd 1-23-87 mac

1-27-87 75 Pltf. and his former counsel AMENDED NOTICE OF APPEAL to Order entered Nov 12, 1986 and modified on Jan 22, 1987, filed. mac

1-29-87	77	Court Reporter's TRANSCRIPT OF HEARING on Dec 5, 1986, filed. (1 Vol.) mac
3-9-87	79	Court Reporter's TRANSCRIPT OF PROCEEDINGS on Aug 18, 1986, filed. (1 Vol.) Paid and Dkt'd 3-11-87 mac
3-9-87	80	Court Reporter's TRANSCRIPT OF PROCEEDINGS on Sept 15, 1986, filed. (1 Vol.) Paid and Dkt'd 3-11-87 mac
3-27-87		RECORD ON APPEAL consisting of All Original Papers (4 Vols. & 4 Vol. Attachment to #31A), Exhibits (1 Envelope) and Transcripts (3 Vols.) forward to Court of Appeals under SEAL. mac
10-24-88	86	Certified Copy of JUDGMENT by Court of Appeals on Sept. 29, 1988 issued as MANDATE on Oct 21, 1988, REVERSING & REMANDING to District Court, except for the matter of sanctions, to the state court, IT IS FURTHER ORDERED that the district court's sanctions order is set aside, and that phase of the case is remanded to the district court for further proceedings consistent with the opinion of this court. IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant and respondent-appellant the costs on appeal, filed. bw dkt'd 11-21-88
10-24-88	87	Certified Copy of OPINION by Court of Apeals, filed. bw dkt'd 11-21-88
10-24-88		CASE REOPENED bw
11-15-88	89	PLTF DONALD J. WILLY'S MOTION TO SEVER DEFTS' CLAIMS FOR RULE 11 SANCTIONS AND TO REMAND, filed. bj dkt'd 11-29-88

12-2-88	90	PLTF DONALD J. WILLY'S MEMORANDUM OF LAW ON THE ISSUE OF RULE 11 SANCTIONS, filed. bj dkt'd 12-5-88
12-27-89	91	Defts' Response to Pltf Donald J. Willy's Memorandum of Law on the issue of Rule 11 Sanctions, filed. bj dkt'd 1-4-89
1-17-89	92	(DH) ORDER FOR HEARING, entered. bj parties ntfd Court's records reflect that the following has been filed. Pltfs Motion to Sveer Rule 11; Sanctions & Remand Answer on file. Conf. set. Mar. 27, 1989 at 10:30 a.m.
3-14-89	94	SUPPLEMENTAL AFFIDAVITS IN SUPPORT of Defts' Request for Attys' Fees. filed. fs EOD 3-22-89
3-27-89	95	Defts' RESPONSES to Pltf Willy's Written Interrogatories and Request for Production of Documents. filed. pn/fs EOD 4-4-89
3-27-89	96	(DH) MINUTES OF MOTION HEARING. filed. FS Rptr: F Warner Appearances: Maness f/pltf; Reed f/deft. Pltfs motion to sever - granted. The sanctions issue is the only issue left in this file. All remaining issues go to state court. Court instructed case manager to file defts responses to pltfs interr.; arguments rendered on sanctions issue - parties to submit Judgments by Apr 3, 89. EOD 4-4-89
4-3-89		Recd proposed Order for Sanctions, fwd to crd. fs EOD 4-4-89

4-3-89		Recd Pltf Willy's Proposed Order for Sanctions and Final Judgment, fwd to crd. fs EOD 4-4-89
4-19-89	97	(DH) ORDER FOR SANCTIONS entered. parties ntfd. fs Defts' Motion for Sanctions GRANTED. Pltf and Pltf's counsel at the time, George A Young, jointly and severally, are to pay $19,307.00 to the defts for the purpose of compensating the defts for the attys' fees incurred in responding to the aforementioned Rule 11 violations. The $19,307 will be tendered to defts' atty-in-charge on or before May 1, 1989. Proof of payment will be filed with the Court on or before May 1, 1989.
4-19-89	98	(DH) FINAL JUDGMENT entered. parties ntfd. fs All issues in this case, other than those related to the claims for Rule 11 sanctions are remanded to the 11th Judicial District Court of Harris County, Texas. Pltf Willy and his former counsel, George A. Young, are sanctioned for their violations of Rule 11, F.R.C.P., in the amount of $19,307.00.
5-1-89	99	Pltf MOTION TO STAY ORDER FOR SANCTIONS. filed. fs
5-1-89	100	Pltf MOTION FOR RELIEF UNDER RULE 59, F.R.CIV.P. filed. fs
5-17-89	102	Defts' RESPONSE to Pltf's Motion to Stay Order for Sanctions. filed. fs eod 5-22-89
5-17-89	103	Defts' RESPONSE to Pltf's Motion for Relief Under Fed. R.Civ. P. 59. filed. fs eod 5-22-89
6-30-89	104	Pltf REPLY to Deft's Response to Pltf's Rule 59 Motion. filed. fs eod 7-6-89

12-29-89	106	(DH) ORDER entered. parties ntfd. fs Motion for relief (Doc #100) is DENIED.
01-05-90	107	Pltf's NOTICE OF APPEAL from the final judgment entered on 4-19-89, filed.
4/4/90	109	TRANSCRIPT OF HEARING held on Mar 27, 1989, filed bw (Ctrp: Fred Warner 1 Vol)
4/10/90		RECORD ON APPEAL consisting of all Original Papers (7 Vols & 3 exp. folders-of attach to instr. #31a,), Transcripts (4 Vols) forwarded to Court of Appeals. bw

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2097

DONALD J. WILLY

Plaintiff-Appellant

vs.

THE COASTAL CORPORATION, ET AL.

Defendants-Appellees

Relevant Docket Entries

11-14-90	Appellant's motion to extend time to file petition for rehearing and suggestion for rehearing en banc to 11-14-90, granted.

11-14-90 Appellant's petition for rehearing, suggestion for rehearing en banc, filed

11-27-90 Order denying petition for rehearing, suggestion for rehearing en banc

No. 90-1150

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DONALD J. WILLY,

Petitioner,

versus

THE COASTAL CORPORATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ORDER

The petition for a writ of ceriorari is granted limited to Question 1 presented by the petition.

June 17, 1991

(4)

No. 90-1150

Supreme Court, U.S.
FILED
JUL 30 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DONALD J. WILLY,

Petitioner,

versus

THE COASTAL CORPORATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER DONALD J. WILLY

MICHAEL A. MANESS
Counsel of Record
for Petitioner
1900 North Loop West
Suite 500
Houston, Texas 77018
(713) 680-9922
(713) 680-0804 (FAX)

July 1991

Quality Prep & Printing, 3909 Dover, Houston, Texas 77087 (713) 643-1636

QUESTION PRESENTED

Did the district court violate Article III § 2 of the Constitution by awarding attorney's fees, claimed by defendants who wrongly invoked subject-matter jurisdiction by mistakenly removing the case from a state court, as a sanction for asserted bad-faith litigation by the plaintiff, who correctly resisted the unconstitutional exercise of federal judicial power, and who did not impede, obstruct, or delay resolution of any jurisdictional issue?

LIST OF ALL PARTIES

Petitioner Donald J. Willy was the plaintiff in the district court and the appellant in the court of appeals.

Respondents in this Court are the Coastal Corporation, Coastal States Management Company, Inc., James R. Paul, George L. Brundrett, Charles F. Jones, William L. Dunker, and E. C. (Bud) Simpson.

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ARGUMENT:

The district court violated Article III § 2 of the Constitution by awarding attorney's fees, claimed by defendants who wrongly invoked subject-matter jurisdiction by mistakenly removing the case from a state court, as a sanction for asserted bad-faith litigation by the plaintiff, who correctly resisted the unconstitutional exercise of federal judicial power, and who did not impede, obstruct, or delay resolution of any jurisdictional issue 15

1. Absent congressional authorization, or obstruction of a jurisdictional determination, a United States district court cannot impose attorney's fees or costs as a sanction in a case it has no constitutional power to decide 16

2. This case does not involve a federal court's inherent power to award attorney's fees and costs for bad-faith litigation within its Article III subject-matter jurisdiction, or for obstruction of a jurisdictional determination. 22

3. A federal court's inherent power to impose criminal contempt sanctions, without statutory authorization or an Article III case or controversy, does not justify awarding attorney's fees to litigants who wrongly invoke subject-matter jurisdiction. 25

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4. This case does not require the Court to determine the extent of a federal court's inherent power to impose attorney's fees and costs, in the absence of statute or subject-matter jurisdiction, as a sanction for obstruction of jurisdictional determinations. 27

5. The district court had no constitutional power to award attorney's fees to defendants wrongly invoking its subject-matter jurisdiction, as a sanction for asserted misconduct relating only to the merits of a case it should never have decided. 32

CONCLUSION 35

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No. 90-1150

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DONALD J. WILLY,

Petitioner,

versus

THE COASTAL CORPORATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER DONALD J. WILLY

OPINIONS BELOW

The district court's opinion on the merits is reported. *Willy v. Coastal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986) (Pet. App. 1). That court's first unreported order awarded attorney's fees of $22,625.00 against Willy and his trial counsel, George A. Young, as a Rule 11 sanction (Pet. App. 6).

The Fifth Circuit's first opinion reversed the district court's decision on the merits for lack of Article III subject-matter jurisdiction, reversed the order awarding attorney's fees, and remanded the case for reconsideration. *Willy v. Coastal Corp.*, 855 F.2d 1160 (5 Cir. 1988) (Pet. App. 9).

The district court's second unreported order awarded attorney's fees of $19,307.00 as a Rule 11 sanction against Willy and Young (Pet. App. 40). The Fifth Circuit's second opinion summarily affirmed that sanction. *Willy v. Coastal Corp.*, 915 F.2d 965 (5 Cir. 1990) (Pet. App. 48).

JURISDICTION

The opinion and judgment of the court of appeals were entered on October 26, 1990 (Pet. App. 48, 56). Willy's timely petition for panel rehearing and suggestion for rehearing en banc were filed on November 14, 1990 and denied on November 27, 1990 (Pet. App. 56). His timely petition for certiorari was filed with the Clerk of this Court on January 17, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS

The relevant provisions of Article III of the Constitution of the United States, Title 28 of the United States Code, and F.R.Civ.P. 11 are reproduced in the appendix to the petition for certiorari, beginning at page 57.

STATEMENT OF THE CASE

Donald J. Willy worked as an in-house environmental attorney for the Coastal Corporation in Houston from 1981 until 1984, when he was fired. In

1985, represented by George A. Young, another Houston lawyer, Willy sued Coastal and others ("Coastal") in a Texas state court. He asserted that the company fired him because of his refusal to falsify environmental reports or to participate in Coastal's criminal concealment of state and federal environmental law violations at several of its facilities. His petition alleged only state causes of action and sought damages and other relief exclusively under Texas law [R. 7: 1096]. None of Willy's claims arose under or was created by a federal statute, and he did not allege entitlement to any federal remedy.[1]

Coastal wrongly removed the case to the United States district court in Houston, mistakenly invoking original federal question jurisdiction under 28 U.S.C. §§ 1331 and 1441(b) [R. 7: 1092, 1093]. After removal, Coastal filed its answer, denying each of Willy's allegations and asserting 14 defenses and a counterclaim [R. 7: 1059].

Young promptly filed a motion to remand on Willy's behalf, correctly contending that no federal question was presented, and that there was no diversity of citizenship or other subject-matter jurisdiction [R. 7: 1049]. Before any supposedly sanctionable misconduct occurred, the district court mistakenly denied the motion to remand [R. 6: 877]. Willy's counsel later twice sought to have the case remanded for lack of subject-matter jurisdiction, without success [R. 4: 469-70; R. 9: 5-6].

---

[1] Willy's principal claim was based on *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985), which recognizes a cause of action in Texas for termination of employment resulting solely from an employee's refusal to violate the law.

Coastal filed a motion to dismiss Willy's principal state claim, maintaining that the nature of the attorney-client relationship precluded an action for wrongful termination of a lawyer's employment under Texas law [R. 6: 779]. Young filed a reply to Coastal's motion to dismiss [R. 5: 567], a six-page motion for partial summary judgment, supported by Willy's 12-page affidavit, and a 110-page supporting brief [R. 5: 609; R. 6: 744], addressed principally to Coastal's 14 defenses and counterclaim [R. 7: 1059].[2] Young also sought and received permission from the district court to file approximately 1,200 pages of documents in support of his partial summary judgment motion [R 4: 527; R. 5: 565; R. 6: 742; R. 9: 38].[3]

Coastal filed a response to the motion for partial summary judgment, demanding Rule 11 attorney's fees on the grounds that there was "no evidence to support the summary judgment" and that the motion was

---

[2] The court of appeals' second opinion mischaracterized the document as "the infamous 110-page summary judgment motion." 915 F.2d at 966 n. 3 and 968 (Pet. App. 49, 54-55). No local court rule imposed a page limitation on the brief.

[3] The documents were produced by Coastal during discovery in an administrative action Willy filed against the company in 1984 with the Wage and Hour Division of the United States Department of Labor. He asserted that the termination of his employment violated the "whistleblower" provisions of several federal environmental statutes. See *In re Willy*, 831 F.2d 545 (5 Cir. 1987). That proceeding is pending before the Secretary of Labor.

The lower courts criticized the documents because they were unnumbered, unindexed, and unorganized (Pet. App. 7, 36, 41), but their filing violated no statute or rule imposing specific requirements in that regard.

"unwarranted" and wholly inadequate" [R. 4: 544]. Coastal also filed a supplemental response and brief supporting its request for sanctions, setting out what it regarded as inappropriate behavior by Young, and attributing his actions to Willy [R. 4: 485; 512]. Although no discovery was undertaken, only two potentially dispositive motions were filed, and less than two hours of hearings were held, Coastal represented that its attorney's fees and costs exceeded $85,000.00 [R. 4: 427].

In its reported memorandum and order, the district court declined to reexamine its subject-matter jurisdiction, rejected Willy's principal state law claim on its merits, and granted Coastal's motion to dismiss the remainder of the case. *Willy v. Coastal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986) (Pet. App. 1).[4] In an unreported order, the court awarded attorney's fees of $22,625.00 to Coastal against Willy and Young, jointly and severally, as a Rule 11 sanction (Pet. App. 6). The order sanctioned Willy for Young's filing of the motion for partial summary judgment, the 110-page supporting brief, the 1,200 pages of documents that the district court granted permission for Young to file, and another brief misciting a provision of the Federal Rules of Evidence [R. 5: 567, 572].[5] Although Willy did not sign these pleadings, the order held him personally responsible for

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[4] The court of appeals' second opinion mistakenly stated that the district court granted Coastal's motion "for dismissal of the federal claims," 915 F.2d at 966 (Pet. App. 49). As the first panel correctly held, Willy asserted no federal claims.

[5] The district court also criticized Willy's 12-page affidavit supporting the motion for partial summary judgment, believing that the affidavit failed properly to authenticate the 1,200 pages of documents (Pet. App. 7).

them, and for all of Young's other supposed misconduct.

Willy filed in the Fifth Circuit a motion to stay the sanctions order pending appeal, on the grounds that Young had been hospitalized in a Minnesota alcohol and drug abuse treatment facility. The court of appeals denied the stay [R. 3: 290-91].

Willy discharged Young, retained his present counsel, and appealed. The Fifth Circuit ruled that the district court lacked subject-matter jurisdiction, reversed its mistaken decision on the merits, and directed that Willy's claims be remanded to the state court from which Coastal had wrongly removed them almost three years earlier. *Willy v. Coastal Corp.*, 855 F.2d 1160 (5 Cir. 1988) (Pet. App. 9, 10). The panel also reversed the Rule 11 sanctions order, stating that "we and the district court retain jurisdiction over the Rule 11 aspect of this case, even though we have held that removal was improper," 855 F.2d at 1172 (Pet. App. 35), and remanded the case for reconsideration in light of the intervening en banc decision in *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5 Cir. 1988) (Pet. App. 37, 38).[6]

On remand, Willy argued that awarding attorney's

[6] The first panel cited two cases, in which sanctions were sought for wrongful removal, to support its position that federal courts without subject-matter jurisdiction are empowered to award attorney's fees to defendants wrongly removing cases from state courts. *Vatican Shrimp Co., Inc. v. Solis*, 820 F.2d 674 (5 Cir. 1987), *cert. denied* 484 U.S. 953 (1987); *News-Texan, Inc. v. City of Garland*, 814 F.2d 216 (5 Cir. 1987). Willy maintained that the decisions do not establish or even suggest that proposition. The second panel thought that "this conclusion is implicit in their broader holding." 915 F.2d at 967 n. 6 (Pet. App. 52).

fees to defendants who wrongly removed the case, against a plaintiff who successfully contested subject-matter jurisdiction, was inconsistent with Rule 11 and would violate Article III of the Constitution [R. 2: 189]. The district court held a hearing, severed the sanctions issues, remanded the remainder of the case to the state trial court from which Coastal had improvidently removed it 39 months earlier, and awarded $19,307.00 in attorney's fees to Coastal as a Rule 11 sanction against Willy and Young, jointly and severally [R. 11: 2-4] (Pet. App. 40). Willy's timely motion under F.R.Civ.P. 59, reurging his argument that Article III foreclosed the award of attorney's fees, was denied without opinion [R. 1: 5; 2: 57].[7]

The Fifth Circuit summarily affirmed the attorney's fee award, holding that "Rule 11 must embrace the conduct of those who resist, as well as those who invoke, federal jurisdiction," in order to effectuate goals of deterrence and punishment. *Willy v. Coastal Corp.*, 915 F.2d. 965, 967 (Pet. App. 48, 52). The court's opinion attributed to "Plaintiff" or "Willy" additional acts of

[7] Willy filed a motion to stay the second sanctions order pending appeal, asserting in an accompanying affidavit that he had assets worth less than $21,000.00 [R. 2: 63, 66]. Coastal did not contest that figure but instead argued that a stay should be denied because Willy had not shown his inability to borrow the money [R. 2: 24, 27-28]. Attached to Willy's application for stay were extracts from Coastal's 1988 annual report, establishing that the company and its operating subsidiaries in that year had revenues of more than $8 billion, profits of more than $718 million, net earnings of more than $157 million, and total assets of almost $8 billion, resources approximately 400,000 times greater than Willy's [R. 2: 69-75]. The district court denied the stay without opinion [R. 1: 6]. Young elected not to appeal the second sanctions order.

purported misconduct by Young, set out in the second sanctions order, that had not been specifically mentioned in the first order almost four years earlier.[8]

The panel believed that the district court possessed inherent power to award attorney's fees to Coastal as a Rule 11 sanction against Willy, even though the court never possessed Article III subject-matter jurisdiction over the controversy at any stage of the proceeding, and even though Coastal, rather than Willy, wrongly invoked federal jurisdiction. The panel opinion analogized this case to *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, 110 S.Ct. 2447, 2456, 110 L.Ed.2d 359, 376 (1990), thinking it involved, not "a judgment on the merits of an action," but rather, like the imposition of costs,

[8] The alleged, previously unremarked violations were (i) Young's inclusion in a pleading of irrelevant and inflammatory allegations that had been stricken; (ii) Young's filing of responses to Coastal's motion to dismiss that were "confusing, misleading, and not reasonably based on law or fact"; (iii) Young's allegation in a pleading that Coastal's counsel were engaged in an improper conflict of interest; (iv) Young's misquotation in a pleading of a Texas disciplinary rule; (v) Young's statement in open court that he intended to depose no less than 60 individuals in connection with the case; and (vi) Young's filing on Willy's behalf of a separate federal civil action "in an effort to harass Defendants in this case" (Pet. App. 43, 44).

Young filed the supposedly "baseless RICO claims against eighty Coastal officers and employees," 915 F.2d at 968 (Pet. App 55), in a different case. The complaint was never served on any defendant, and the federal judge in that case did not impose Rule 11 or other sanctions.

The Fifth Circuit mistakenly asserted that Willy "[used] the discovery process to harass opposing parties," 915 F.2d at 966 n. 3 and 967 (Pet. App. 49, 52). In reality, the district court stayed discovery pending its ruling on Coastal's motion to dismiss [R. 4: 527].

attorney's fees, and contempt sanctions, "the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate." 915 F.2d at 967 (Pet. App. 51).[9]

The court of appeals also believed that awarding attorney's fees against Willy was not foreclosed by the defendants' wrongful removal of the action. Finding a colorable basis for the district court's mistaken rejection of Willy's jurisdictional position, and that Coastal acted in good faith, the panel reasoned that *Cooter & Gell* permits litigants and lawyers wrongly invoking federal jurisdiction to recover attorney's fees under a federal court's inherent power, even though the derelictions and award relate only to the merits of a controversy the court was never constitutionally empowered by Article III or by Congress to decide in the first place. 915 F.2d at 967 and n. 7 (Pet. App. 52).

Finally, affirming the broad discretion that *Cooter & Gell* accords to federal trial judges under Rule 11, the Fifth Circuit found no abuse of discretion in this case. The panel condemned "reams of irrelevant and

[9] The panel acknowledged Willy's argument that *Cooter & Gell* is not controlling because the Rule 11 attorney's fee award there was collateral to an Article III controversy over which the federal court properly exercised subject-matter jurisdiction, invoked by the sanctioned attorneys, even though they dismissed the case under F.R.Civ.P. 41(a) before the sanctions were imposed. Here, by contrast, the federal court never possessed Article III subject-matter jurisdiction at any stage of the proceedings, and Willy, the sanctioned party, did not invoke such jurisdiction but instead repeatedly and successfully contested it. Nonetheless, the court found *Cooter & Gell's* "discussion of the collateral character of Rule 11 orders applicable in this context as well." 915 F.2d at 967 n. 5 (Pet. App. 51).

unorganized material," 915 F.2d at 966-67 n. 3 (Pet. App. 49), without mentioning that the district court granted permission for Young's filing of the documents, or that Coastal produced them. The panel also did not disclose that virtually all of the supposed misbehavior attributed to Willy personally by its opinion and the district court's order had been committed by his lawyer, or that the revised order awarded attorney's fees for purported misconduct never specifically mentioned in the first order 29 months earlier. The court mistakenly stated that the first panel affirmed the original sanctions order when it actually reversed it.[10] It summarily ratified the district court's implicit determination that the substantial award favoring the defendants was appropriate and reasonable, as required by Rule 11, and was the "least severe sanction adequate to [serve] the purpose" of the Rule. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 878 (5 Cir. 1988) (en banc). Willy's petition for panel rehearing and suggestion for rehearing en banc were denied without opinion (Pet. App. 56).

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[10] The first panel nullified the original sanctions order. "The sanctions order is therefore reversed and the matter of sanctions is remanded to the district court for further proceedings consistent with this opinion and *Thomas*." 855 F.2d at 1173 (Pet. App. 38). The panel's judgment recited that the sanctions order "is set aside" [R. 3: 224]. Nevertheless, the second panel held that the first panel "affirmed the award of Rule 11 sanctions," 915 F.2d at 966 (Pet. App. 49). Concluding that "we are bound by our prior decision affirming the district court's award of sanctions against both Willy and his attorney," 915 F.2d at 968 (Pet. App. 54), the court declined for that reason to consider or decide five issues presented by Willy's brief. Although Willy's petition for panel rehearing and suggestion for rehearing en banc pointed out the error, the Fifth Circuit refused to correct it.

SUMMARY OF THE ARGUMENT

1. Article III of the Constitution limits the judicial power of the United States to cases and controversies over which Congress has conferred subject-matter jurisdiction. Absent congressional authorization, or interference with the determination of its jurisdiction, a federal court has no inherent power to award relief in a case over which it is constitutionally powerless to act. "If there were no jurisdiction, there was no power to do anything but to strike the case from the docket." *The Mayor v. Cooper*, 6 Wall. 247, 250 (1868).

2. In cases within their Article III subject-matter jurisdiction, federal courts possess an inherent power to award attorney's fees and costs for bad-faith litigation. *Chambers v. NASCO, Inc.*, ___ U. S. ___ (1991) [59 U.S.L.W. 4595, June 6, 1991]. That power, implicit in the Constitution, is necessary to attain the ends for which Congress created lower federal courts: to determine reliably, as courts of limited jurisdiction, that they are empowered to act, to resolve cases or controversies defined by Article III and by statute, and to assure the just, speedy, and inexpensive determination of federal judicial proceedings.

Even in the absence of subject-matter jurisdiction, federal courts must have a coextensive, functionally equivalent inherent power to award attorney's fees and costs against those who unreasonably or in bad faith impede, obstruct, or delay the eventual determination that subject-matter jurisdiction is lacking, or who willfully violate orders entered to preserve the *status quo* until jurisdictional questions are resolved. A federal court has jurisdiction to determine its own jurisdiction, apart from statute or the constraints of Article III. It properly may

regard strategic concealment of jurisdictional defects, calculated obstruction of preliminary jurisdictional determinations, or willful violation of orders necessary to permit orderly resolution of questions relating to its constitutional power to act as an interference with the performance of a judicial responsibility consigned to it by the Constitution. *United States v. United Mine Workers*, 330 U.S. 258, 290-92 & n. 57 (1947); *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79 (1988). Awarding attorney's fees and costs as a sanction in such cases reasonably promotes necessary, constitutionally indispensable objectives. *United States v. Hudson*, 7 Cranch 32 (1812).

3. Independently of subject-matter jurisdiction or an Article III case or controversy, federal courts possess inherently a limited, defensive criminal contempt power to punish by fine or imprisonment deliberate disruptions of judicial proceedings, willful disregard of lawful court rules and orders, or other calculated misconduct affecting the performance of judicial duties. *United States v. Providence Journal Co.*, 485 U.S. 693, 701-02 (1988). Criminal contempt penalties are different in principle from civil sanctions, because they serve entirely different ends.

A federal court's inherent authority to award attorney's fees, costs, or civil contempt penalties as a sanction for bad-faith misconduct arises from the character and circumstances of the case before the court. That authority is determined by the claims and defenses asserted, the residence of the parties, or other jurisdictional facts bringing the controversy within the judicial power conferred by Article III and by Congress.

In contrast, criminal contempt punishment promotes no compensatory or private interests, does not necessarily implicate subject-matter jurisdiction, and does not depend on the character of the proceedings under consideration. Criminal contempt power is not derived from Article III's specification of the kinds of cases or controversies federal courts properly may hear and decide, but from an inherent right of self-protection the federal judiciary necessarily must have if it is to function effectively.

4. This case does not involve interference with jurisdictional determinations or criminal contempt sanctions. The narrow question presented also does not require consideration of very different, substantially more difficult issues involving a federal court's asserted power, either inherently or by a rule of procedure, to award attorney's fees as a sanction against those who wrongly invoke subject-matter jurisdiction. Resolution of those much broader, potentially more troublesome problems is not necessary to the disposition of this case, and should be left to a controversy that squarely presents them. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (concurring opinion of Justice Brandeis); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (concurring opinion of Justice Rehnquist).

5. Willy and his trial counsel did not wrongly invoke federal subject-matter jurisdiction, and they did not impede, obstruct, or delay the eventual determination that jurisdiction did not exist. They repeatedly, correctly, and in a procedurally appropriate manner contested the court's constitutional competence to hear and decide their case. Their purported improprieties related only to

the merits of a dispute that the court was constitutionally powerless to decide, at every stage of the proceeding.

Coastal's asserted good faith in removing the action, the district court's presumptive good faith in hearing it, and the purportedly colorable jurisdiction exercised in deciding it are irrelevant. The judicial power of the United States is not determined by the good intentions of litigants or judges, or by claims that supposedly seem to confer subject-matter jurisdiction, but in reality do not. In a case otherwise beyond its constitutional authority, a federal court does not empower itself to award attorney's fees by incorrectly resolving a jurisdictional issue. The Constitution and Congress determine which cases lower federal courts may hear and decide, not judges.

Federal courts are not helpless to deal effectively with misbehavior arising during their mistaken consideration of the merits of cases beyond their subject-matter jurisdiction. They can dismiss or remand the case. They can suspend, disbar, or sanction incompetent or irresponsible lawyers. They can reprimand offenders or, as a last resort, impose criminal contempt sanctions. But they are not authorized by statute, rule, or constitutional necessity to compensate litigants who mistakenly precipitate a futile and unconstitutional waste of judicial time and resources.

The district court was never empowered by the Constitution or by Congress to deal with this controversy. It lacked the constitutional authority to award attorney's fees, to those who wrongly removed the case, for asserted misconduct relating only to the merits of unconstitutional litigation and not to jurisdictional issues. Because that sanction violated Article III, the district court's unconstitutional order, and the judgment of the

court of appeals mistakenly affirming it, should be reversed.

ARGUMENT

The district court violated Article III § 2 of the Constitution by awarding attorney's fees, claimed by defendants who wrongly invoked subject-matter jurisdiction by mistakenly removing the case from a state court, as a sanction for asserted bad-faith litigation by the plaintiff, who correctly resisted the unconstitutional exercise of federal judicial power, and who did not impede, obstruct, or delay resolution of any jurisdictional issue.

Federal courts possess the inherent power to award attorney's fees and costs for bad-faith litigation in Article III cases and controversies over which Congress has conferred the constitutional competence to act. They possess a coextensive inherent power, functionally equivalent to that existing in cases actually within their constitutional and statutory authority, to award attorney's fees and costs as a sanction for obstruction of a jurisdictional determination. Apart from Article III and the case-or-controversy requirement, they exercise an inherent, defensive criminal contempt power to protect themselves, their judicial proceedings, and their lawful orders from calculated harm, disruption, or disobedience.

What federal courts do not have is an inherent power to award attorney's fees or costs to those wrongly invoking their subject-matter jurisdiction, against those correctly resisting an unconstitutional exercise of federal judicial power, without obstructing the eventual determination that jurisdiction is lacking. Such an award violates Article III of the Constitution. The contrary holdings below substantially undermine this Court's

uncompromising historical insistence that the federal judiciary must scrupulously observe, and confine itself within, the jurisdictional constraints prescribed by the Constitution and by Congress.

1. Absent congressional authorization, or obstruction of a jurisdictional determination, a United States district court cannot impose attorney's fees or costs as a sanction in a case it has no constitutional power to decide.

In plain, simple language, Article III of the Constitution limits the judicial power of the United States to particularly described cases or controversies. Since *Marbury v. Madison*, 1 Cranch 137 (1803), this Court's decisions often have stressed the principle that questions of federal court jurisdiction present constitutional issues, not simply procedural problems to be decided by resort to expediency, in whatever fashion best serves efficient judicial administration, institutional convenience, or the personal preferences of individual judges. Federal courts do not create their own subject-matter jurisdiction. The Court's decisions repeatedly have underscored the simple but profoundly important proposition that federal courts are courts of limited jurisdiction, confined by Article III of the Constitution and by the legislation of Congress.[11] The Court has adhered rigorously to the view that limitations on federal jurisdiction "must be neither disregarded nor evaded," *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978), because permitting lower federal courts to act beyond constitutional and legislative constraints would invade the

[11] *E.g., Karcher v. May*, 484 U.S. 72, 77 (1987); *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 701-02 (1982); *Aldinger v. Howard*, 427 U.S. 1, 15 (1976).

province reserved to state courts by the Constitution.[12] "Due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which [Congress] has defined." *Healy v. Ratta*, 292 U.S. 263, 270 (1934); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971).[13]

Congress did not empower the federal district court to act in this case. A statute purporting to confer such competence would have violated Article III. The case arose exclusively under state law, there was no federal question, and there was no diversity of citizenship.

Congress also did not authorize the award of attorney's fees or costs to defendants wrongly invoking federal subject-matter jurisdiction, against a plaintiff properly resisting its unconstitutional exercise. Under the

[12] "Let it be remembered, also, for just now we may be in some danger of forgetting it, that questions of jurisdiction were questions of power as between the United States and the several States." Curtis, Notice of the Death of Chief Justice Taney, Proceedings in Circuit Court of the United States for the First Circuit 9 (1864).

[13] "For that reason, every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review'." *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986), quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). When a lower federal court lacks subject-matter jurisdiction, the Supreme Court reviews the case "not [on] the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Corrick*, 298 U.S. 435, 440 (1936). *Cf.* Supreme Court Rule 14.1(i) ("If review of a judgment of a United States court of appeals is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance").

necessary and proper clause of the Constitution, Art. 1 § 8, and the broad legislative authority conferred by Article III § 1 to create and determine the jurisdiction and other powers of lower federal courts, Congress undoubtedly has a constitutional prerogative to provide for recovery of attorney's fees and costs against those wrongly invoking federal subject-matter jurisdiction, even in cases outside Article III. *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965); *Sibbach v Wilson & Co., Inc.*, 312 U.S. 1, 9-10 (1941).[14] For obvious reasons, however, Congress has never authorized recovery of fees or costs against parties who prevail on jurisdictional grounds.

Since the Federal Rules of Civil Procedure do not confer subject-matter jurisdiction on federal courts, neither the Rules Enabling Act, 28 U.S.C. § 2072(a), nor F.R.Civ.P. 11 provides a substantive source of judicial power, beyond that conferred by Article III and by Congress.[15] Nor can it be maintained plausibly that a

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[14] See, *e.g.*, 28 U.S.C. § 1919 (authorizing "payment of just costs" in any action or suit dismissed for lack of jurisdiction); 28 U.S.C. § 1447(c) (authorizing attorney's fees and costs for wrongful removal). See also *Mashak v. Hacker*, 303 F.2d 526, 527 (7 Cir. 1962), confirming the congressional power to authorize recovery of costs in the absence of subject-matter jurisdiction.

[15] "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . ." F.R.Civ.P. 82. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370 and n. 7 (1978); *Aldinger v. Howard*, 427 U.S. 1, 8-9 (1976); *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 10 (1941); *cf.* 28 U.S.C. § 2072(b) (Federal Rules of Civil Procedure do not "abridge, enlarge or modify any substantive right"). The lower federal courts in this case, invoking Rule 11 even though the district court never possessed subject-matter jurisdiction at any stage of the proceedings, missed this point. See note 29, *infra*.

federal court's acknowledged collateral authority to award attorney's fees as a sanction in a case that was within its Article III jurisdiction, but that was voluntarily dismissed by the sanctioned parties, as in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, 110 S.Ct. 2447, 2456, 110 L.Ed.2d 359, 376 (1990), encompasses the entirely different situation in which a federal court was never constitutionally empowered to act, at any stage of the proceedings. Like pendent or ancillary jurisdiction,[16] an exercise of federal judicial power that is collateral to a federal case, as in *Cooter & Gell*, demands some sort of Article III jurisdiction at some point in the controversy. If federal subject-matter jurisdiction never existed, at any stage of the proceedings before the federal court, an award of attorney's fees cannot be deemed collateral to anything that Article III permits the court to decide.

Coastal's claimed entitlement to attorney's fees for asserted bad-faith litigation, apart from an Article III case or controversy, is not in itself "consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the [federal] judicial power extends." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240 (1937). An "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, ___, 110 S. Ct. 1249, 1255, 108 L.Ed.2d 400, 413 (1990), citing *Diamond v. Charles*, 476 U.S. 54, 70-71 (1986). In the absence of statute, or obstruction of the determination of its jurisdiction, a

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[16] *Finley v. United States*, 490 U.S. 545 (1989); *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

federal court is not constitutionally empowered to adjudicate the quality of a litigant's performance on the merits of unconstitutional litigation, or to award costs or fees merely because a federal judge thinks that might be a good idea.

As with any of its other orders, the validity of a federal court's award of attorney's fees or costs as a sanction for asserted bad-faith litigation, unrelated to interference with or obstruction of a jurisdictional determination, "depends upon that court's having jurisdiction over both the subject-matter and the parties."[17] Without congressional authorization, a federal court lacking Article III subject-matter jurisdiction has no inherent power to order the payment of fines, costs, fees, or expenses of litigation, even against parties wrongly invoking its jurisdiction. "If there were no jurisdiction, there was no power to do anything but to strike the case from the docket."[18] An unconstitutional award of costs or attorney's fees, like an order imposing functionally equivalent civil contempt and statutory penalties, must be

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[17] *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 701-02 (1982). The Court in *Compagnie Des Bauxites* and other decisions draws a bright line between subject-matter jurisdiction, which implicates Article III concerns, and personal jurisdiction over parties to a federal controversy, which does not. *See, e.g., United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988); *Omni Capital Internat'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987).

[18] *The Mayor v. Cooper*, 6 Wall. 247, 250-51 (1868); *Smyth v. Asphalt Belt Ry. Co.*, 267 U.S. 326, 330 (1925); *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 640, 642 (1923); *Citizens' Bank v. Cannon*, 164 U.S. 319, 324 (1896); *Blacklock v. Small*, 127 U.S. 96, 105 (1888); *Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U.S. 379, 386-87 (1884).

reversed "in its entirety."[19]

It remains a "fair presumption" that federal courts lack the constitutional power to act until the contrary appears.[20] They cannot exercise an inherent power to award costs or attorney's fees, without congressional authorization, against those properly resisting the mistaken exercise of subject-matter jurisdiction, when Article III competence to decide the case never existed at any stage of the litigation. If the district court had correctly determined that it lacked the constitutional authority to decide Willy's case, it would have been empowered to do no more than enter an order promptly remanding the controversy. Denying the power to award fees and costs to federal judges correctly deciding their lack of subject-matter jurisdiction, but conferring it on those who have erred in that determination, "would by the act of the parties [and a federal judge] work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them." *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 18 (1951).

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[19] *United States v. United Mine Workers*, 330 U.S. 258, 294-95 (1947) (civil contempt penalties for violation of temporary restraining order); *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76-80 (1988) (civil contempt penalties for resistance to subpoena duces tecum in case over which district court exercised colorable jurisdiction); *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950) (statutory civil penalties).

[20] *Turner v. President, Directors, and Co. of the Bank of North America*, 4 Dall. 8, 11 (1799). "A federal court may not decide cases when it cannot decide cases, and must determine whether it can, before it may." *Cross-Sound Ferry Services, Inc. v. ICC*, 934 F.2d 327, ___ (D.C. Cir. 1991) (dissenting opinion of Judge Thomas).

2. This case does not involve a federal court's inherent power to award attorney's fees and costs for bad-faith litigation within its Article III subject-matter jurisdiction, or for obstruction of a jurisdictional determination.

Federal courts have an established inherent power to award attorney's fees and court costs for bad-faith litigation, in cases they hear and decide under Article III, pursuant to a congressional grant of subject-matter jurisdiction.[21] "The inherent powers of federal courts are those which 'are necessary to the exercise of all others'." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980), citing *United States v. Hudson*, 7 Cranch 32, 34 (1812). Inherent power under Article III "is not a broad reservoir . . ., ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function."[22]

Even in cases beyond the judicial power conferred by Article III, federal courts historically have exercised an inherent, functionally equivalent power to adjudicate questions relating to their subject-matter jurisdiction, to punish disruptions of or interference with those jurisdictional determinations, and to sanction willful

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[21] *Chambers v. NASCO, Inc.*, ___ U. S. ___ (1991) [59 U.S.L.W. 4595, June 6, 1991]; *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975); *Hall v. Cole*, 412 U.S. 1, 5 (1973); *F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116, 129 (1974); *Link v. Wabash R. Co.*, 370 U.S. 626 (1962).

[22] *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696, 702 (5 Cir. 1990), *aff'd sub nom. Chambers v. NASCO, Inc.*, ___ U.S. ___ (1991) [59 U.S.L.W. 4595, June 6, 1991], citing *Roadway Express v. Piper*, *Link v. Wabash R. Co.*, and *United States v. Hudson.*

disobedience of court orders designed to enable resolution of subject-matter jurisdictional questions to be undertaken in an orderly, unhurried, procedurally appropriate manner.[23] With or without a congressional grant of subject-matter jurisdiction, binding federal court orders may be issued "as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter." *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79 (1988). The same considerations reinforce the authority of Congress, consistently with the sweeping legislative power over lower federal courts conferred by the necessary and proper clause and by Article III § 1 of the Constitution, to provide by statute for recovery of costs and attorney's fees against those wrongly invoking federal jurisdiction. *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 9-10 (1941).

A constitutional necessity, in the sense contemplated by *United States v. Hudson*, 7 Cranch 32 (1812), dictates such a result. Litigants and lawyers before a federal court cannot be permitted to impede, obstruct, or delay the orderly resolution of jurisdictional issues, or to gamble on the possibility of escaping responsibility for their actions if the court's power to act on the merits eventually is foreclosed. Jurisdiction to determine jurisdiction logically must implicate precisely those

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[23] *United States v. Shipp*, 203 U.S. 563, 573 (1906); *United States v. United Mine Workers*, 330 U.S. 258, 289-95 (1947); *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79 (1988). "The federal courts have jurisdiction to determine whether they have jurisdiction to hear a case . . ., and therefore have authority to sanction parties for misfeasance connected with the determination of whether jurisdiction exists." *Davis v. Cluet, Peabody & Co.*, 667 F.2d 1371, 1374 n. 8 (11 Cir. 1982).

inherent powers that the court exercises in Article III cases or controversies. Even if a federal court ultimately is determined not to have the constitutional power to decide the case, it still must have the authority to resolve jurisdictional questions, free from identical impositions and distractions that burden the efficient and orderly determination of all other cases on the docket.

Inherent and constitutional powers are interrelated and correlative. In a case within the court's subject-matter jurisdiction, the power to award attorney's fees and costs for bad-faith litigation is essential to preserve the court's authority over a case properly before it for decision. Precisely the same authority logically must extend to obstruction of the court's consideration and determination of jurisdictional issues. Conversely, if the Constitution and Congress never authorized a federal court to act in the first place, at any stage of the proceedings, there can be no conceivable constitutional necessity to award attorney's fees against litigants properly contesting federal subject-matter jurisdiction, in favor of litigants mistakenly invoking it, to compensate them for wrongly inflicting a case on the federal courts. When subject-matter jurisdiction is lacking, and Congress has not authorized recovery of fees or costs, the appropriate course is found, not in Rule 11, or in some supposed inherent power, but in F.R.Civ.P. 12(h)(3)[24] or in 28 U.S.C. § 1447(c).[25]

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[24] "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

[25] "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

3. A federal court's inherent power to impose criminal contempt sanctions, without statutory authorization or an Article III case or controversy, does not justify awarding attorney's fees to litigants who wrongly invoke subject-matter jurisdiction.

Federal judges always have had an inherent criminal contempt power, necessary to protect themselves, their courts, and all acts incidental to their judicial office from disruption, physical harm, abuse, or obstruction. *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 798 (1987); *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 65-66 (1924). Because the necessity for the existence and exercise of such an inherent power is not determined by the character of the case before the court, it is neither subject to the Article III case-or-controversy requirement nor dependent upon statutory authorization by Congress. *United States v. Hudson*, 7 Cranch 32 (1812); *Cooke v. United States*, 267 U.S. 517 (1925).[26]

For example, federal judges conceivably might exercise inherent criminal contempt powers, not only in conjunction with cases over which they lack Article III

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[26] The example of the federal judge punched in the nose during the hearing of a case which is then promptly dismissed, thought by Coastal somehow to be relevant, is not helpful here. *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1076-79 (7 Cir. 1987), *cert. dism'd* 485 U.S. 901 (1988), cited in Respondent's Brief in Opposition to Certiorari at p. 8. It makes good sense to say that a federal judge, assaulted during the course of a judicial proceeding, must have the inherent power, apart from the court's jurisdiction to hear the case, to jail the offender or to impose a substantial fine. It makes no sense to maintain that the judge possesses an inherent power to award attorney's fees or costs for such misbehavior.

subject-matter jurisdiction, but when participating in judicial business that is not a case or controversy at all, such as judicial conferences, investitures, dedications of portraits, naturalization proceedings, and similar ceremonial occasions, whether within or outside of federal courthouses. Inherent criminal contempt powers undoubtedly would reach willful violations of valid court rules and orders that relate, not to the adjudication of individual cases, but to maintaining the physical security, integrity, and decorum of all federal judicial proceedings, such as by prohibiting cameras, recording equipment, cellular telephones, paging devices, or weapons in the courtroom, or by requiring lawyers, litigants, or witnesses to pass through metal detectors at security checkpoints.

The inherent criminal contempt power serves purposes altogether different from those promoted by civil penalties. The power to impose attorney's fees, costs, or civil contempt punishment as a sanction arises from the facts and circumstances of individual cases within the Article III judicial power. There is a necessity for them, in a constitutional sense, because the court is empowered by the Constitution and by Congress to decide the case.

In contrast, criminal contempt penalties promote no compensatory or private interests, and are not dependent on the circumstantial context within which an actual or imminently threatened disruption or obstruction of judicial authority occurs. The inherent criminal contempt power "[serves] to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience," *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911), to preserve order and decorum in federal courtrooms, and to penalize disruption of those

duties federal judges are constitutionally empowered to undertake by Article III and by Congress. These considerations are irrelevant to the attorney's fees awarded in this case.[27]

4. This case does not require the Court to determine the extent of a federal court's inherent power to impose attorney's fees and costs, in the absence of statute or subject-matter jurisdiction, as a sanction for obstruction of jurisdictional determinations.

This case does not involve interference with a jurisdictional determination or a criminal contempt sanction. The question presented also does not require the Court to determine the sources and scope of a United States district court's authority to award attorney's fees or costs, in the absence of statute or subject-matter jurisdiction. That inquiry presents a number of substantial difficulties. The Court should defer it to another day. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (concurring opinion of Justice Brandeis).[28]

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[27] Accusations of criminal contempt cannot be made or prosecuted by opposing counsel for private parties in civil litigation. *United States v. Providence Journal Co.*, 485 U.S. 693 (1988). They implicate constitutional principles applicable to criminal prosecutions, including the presumption of innocence and the requirement of proof of guilt beyond a reasonable doubt. *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis, & Omaha Ry. Co.*, 266 U.S. 42, 66 (1924).

[28] Particularly when Article III problems are presented, "rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (concurring opinion of Justice Rehnquist).

1. The Rules Enabling Act empowers this Court "to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . ." 28 U.S.C. § 2072(a). The Federal Rules of Civil Procedure by their terms are applicable to "all suits of a civil nature" in the United States district courts, F.R.Civ.P. 1, apply "to civil actions removed to the United States district courts from the state courts," and "govern procedure after removal." F.R.Civ.P. 81(c).

Notwithstanding this unequivocal language, the Rules Enabling Act and F.R.Civ.P. 11 are irrelevant and inapplicable to cases or controversies that a federal court is not constitutionally empowered to decide. Congress undoubtedly did not authorize the Supreme Court to "prescribe general rules of practice and procedure" for unconstitutional litigation. The implicit premise of both the Rules Enabling Act and the Federal Rules of Civil Procedure is that rules of practice and procedure are not necessary for disputes beyond the judicial power conferred by Article III. Such cases must be promptly dismissed or remanded, because to do otherwise would violate the Constitution of the United States.[29]

2. Congress has provided in 28 U.S.C. § 1447(c) for recovery of attorney's fees and costs when a defendant

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[29] Procedural rules governing court administration (for example, barring television cameras or recording devices in federal courtrooms) are authorized, 28 U.S.C. § 2071, because their validity is not dependent on the circumstances of individual cases. In contrast, rules governing pleadings, discovery, motions, hearings, trials, and related matters under § 2072(a) depend for their rational application on subject-matter jurisdiction. The Federal Rules of Civil Procedure explicitly so provide. See note 15, *supra*.

wrongly removes a case over which the federal court lacks subject-matter jurisdiction.[30] In contrast, when a plaintiff's complaint mistakenly invokes subject-matter jurisdiction, Congress in 28 U.S.C. § 1919 has authorized only the recovery of costs. Attorney's fees are not costs, unless Congress explicitly so provides. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 260 (1975) (Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted"). It is implausible and unreasonable to suggest that Rule 11 or an inherent power authorizes attorney's fees as a sanction for a plaintiff's filing of a jurisdictionally defective complaint, in the face of a statute authorizing only costs when a complaint fails to invoke subject-matter jurisdiction.

3. Lower federal courts have held or implied in *dicta* that, apart from any statutory authority, they can use Rule 11 or an equivalent inherent power to award attorney's fees as a sanction against a jurisdictionally

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[30] Since Congress has authorized attorney's fees and costs for wrongful removal, there is no need to invoke Rule 11 to award them, a point lower federal courts consistently have missed. See, *e.g.*, *Unanue-Casal v. Unanue-Casal*, 898 F.2d 839, 841 (1 Cir. 1990) (attorney's fees sought under Rule 11, in absence of subject-matter jurisdiction, against defendant wrongfully removing case from state court); *S. A. Auto Lube, Inc. v. Jiffy Lube Internat'l, Inc.*, 842 F.2d 946, 947 n. 1 (7 Cir. 1988) (same); *Vatican Shrimp Co., Inc. v. Solis*, 820 F.2d 674, 680 and n. 7 (5 Cir. 1987), *cert. denied* 484 U.S. 953 (1987) (same); *News-Texan, Inc. v. City of Garland*, 814 F.2d 216, 220 and n. 8 (5 Cir. 1987) (same); *Johnson v. Smith*, 630 F. Supp. 1, 4 (N.D. Cal. 1986) (same); see also *Westlake North Property Owners Ass'n v. City of Thousand Oaks*, 915 F.2d 1301, 1303 (9 Cir. 1990) (attorney's fees sought by removing defendants following dismissal on merits; cites and follows *Willy*).

defective complaint or removal petition, on the theory that they are exercising jurisdiction to determine jurisdiction.[31] For example, in *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1078 (7 Cir. 1987), *cert. dism'd* 485 U.S. 901 (1988), followed in *Schering Corp. v. Vitarine Pharmaceuticals, Inc.*, 889 F.2d 490, 495 (3 Cir. 1989), the court thought that a federal trial court could

> engage in all the usual judicial acts, even though it has no power to decide the case on the merits. It may supervise discovery, hold a trial, and order the payment of costs at the end. If the complaint is indeed too silly to create subject matter jurisdiction, attorneys' fees should be an ordinary incident of the award of costs.

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[31] See, e.g., *Chemiakin v. Yefimov*, 932 F.2d 124, 127 (2 Cir. 1991) (cites and purports to follow *Willy* in holding that federal courts "may impose sanctions pursuant to Rule 11," even when they lack subject-matter jurisdiction to adjudicate the merits of a dispute); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1076-79 (7 Cir. 1987), *cert. dism'd* 485 U.S. 901 (1988) ("silly" complaint or other improper imposition on federal court's time and resources sanctionable as interference with jurisdiction to determine jurisdiction); *Orange Production Credit Ass'n v. Frontline Ventures Ltd.*, 792 F.2d 797, 800 (9 Cir. 1986) (filing of complaint "completely [lacking] a factual foundation for subject matter jurisdiction" sanctionable under Rule 11); *Wojan v. General Motors Corp.*, 851 F.2d 969 (7 Cir. 1988) (plaintiff sought Rule 11 sanctions against defendant for alleged bad-faith concealment of jurisdictional defect) ; *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603 (1 Cir. 1988) (groundless complaint, followed by Rule 41(a) dismissal, sanctionable as misconduct committed during consideration of jurisdiction); *cf. Trohimovich v. Commissioner*, 776 F.2d 873, 875 (9 Cir. 1985) (appeal dismissed for lack of jurisdiction; appellant sanctioned for abusive tactics). See also the wrongful removal cases cited in note 30, *supra*.

This view of the federal judicial power is mistaken. Cases presenting silly complaints or removal petitions that do not invoke subject-matter jurisdiction must be immediately dismissed or remanded, not allowed to roll forward indefinitely while the judge "supervises discovery" or "holds a trial."[32] A federal court abdicating its constitutional responsibility to determine promptly and correctly whether it has the Article III competence to decide the case does not acquire some metaphysical, transcendent authority over the controversy merely by proclaiming it has been doing one thing (determining jurisdiction), when in reality it has been doing something entirely different (deciding the case). A judge's error does not generate the constitutional authority to act. Acceptance of that idea would undermine Article III's historical role as a meaningful, effective limitation on the power of the federal judiciary.

4. Invoking Rule 11 or inherent power as a justification for awarding attorney's fees, in the absence of subject-matter jurisdiction, ignores the circumstance that functionally equivalent civil contempt penalties depend on such jurisdiction:

> It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls

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[32] See *Davis v. Cluet, Peabody & Co.*, 667 F.2d 1371, 1373 (11 Cir. 1982) (federal district court, lacking subject-matter jurisdiction, cannot impose sanction of dismissal on the merits for misconduct unrelated to jurisdictional determination).

> with an injunction which events prove was erroneously issued, . . . *and a fortiorari when the injunction or restraining order was beyond the jurisdiction of the court*.

United States v. United Mine Workers, 330 U.S. 258, 294-95 (1947) (emphasis added).

5. Lower courts sustaining awards of attorneys fees in the absence of statute or subject-matter jurisdiction do not cite this Court's cases denying to federal trial judges the power to award costs without authorization from Congress, note 18, *supra*. They fail to point out that 28 U.S.C. § 1919 allows only costs, not attorney's fees, when a plaintiff's complaint is dismissed for lack of subject-matter jurisdiction. They overlook the circumstance that Rule 11 and the Rules Enabling Act have no rational application in cases beyond the Article III judicial power. They do not even mention, much less address, the constitutional implications of their decisions.

The Court need not and should not attempt to resolve now these broader, more difficult questions. Willy's case presents a much narrower, simpler issue.

5. The district court had no constitutional power to award attorney's fees to defendants wrongly invoking its subject-matter jurisdiction, as a sanction for asserted misconduct relating only to the merits of a case it should never have decided.

In the absence of congressional authorization, the district court awarded attorney's fees to defendants who wrongly invoked its subject-matter jurisdiction, against a plaintiff who properly contested such jurisdiction, and who promoted, rather than impeded or obstructed, the eventual determination that the court lacked the constitutional power to decide the case. The self-

defeating irrationality of that decision is apparent when the inherent power to sanction is viewed in conjunction with related policies underlying F.R.Civ.P. 11.

Rule 11, like the inherent power to award attorney's fees and costs for bad-faith litigation, is designed to streamline federal practice, to discourage legally or factually baseless filings, and to free the federal courts from having to devote scarce judicial time and resources to matters that should not have been brought or pursued. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, 110 S.Ct. 2447, 2456, 110 L.Ed.2d 359, 376 (1990). The baseless filing that initiated this case was Coastal's removal petition. Although they did not prevail in this litigation, the defendants were awarded more than $19,000.00 in attorney's fees for preparing documents, conducting conferences, and attending hearings in a case that never should have been in the federal court in the first place. Far from discouraging the filing of legally or factually baseless complaints or removal petitions, the Fifth Circuit's inversion of Rule 11 actually encourages them.

Coastal's improvident removal of this case delayed its final disposition for years and inflicted significant harm on the federal system and on Willy himself. A wrongful, strategically motivated removal petition compelled an individual with limited financial resources to fight a marathon war of attrition against an $8 billion corporate adversary, over issues having nothing whatever to do with the merits of his case. Willy's state claims still have not been brought to trial, nearly six years after they were properly asserted in a state court.

Recognizing an unprecedented inherent constitutional power to award attorney's fees in this case would make no more sense than a statute authorizing the

recovery of attorney's fees and costs against plaintiffs who succeed in having cases remanded to state court for lack of subject-matter jurisdiction, in favor of defendants wrongly removing them. There is no sound reason in logic or policy for compensating those who mistakenly waste a federal court's valuable time and resources by persuading it to consider and decide a case that is beyond its constitutional province, particularly when other alternatives are available.[33]

The idea of colorable jurisdiction, to which the court of appeals referred in passing, 915 F.2d at 967 n. 7 (Pet. App. 52), has been decisively repudiated by this Court as a source of federal judicial authority. *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988). Either a federal court has the constitutional power to act, or it does not. If it does not, no purported misconduct of a plaintiff, supposedly colorable claims of defendants, or asserted good faith of a federal trial judge can confer constitutional competence when it does not otherwise exist.[34] A federal court's mistaken determination that it has the constitutional authority to act, when it really does not, cannot spontaneously generate the Article III judicial power to award attorney's fees.

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[33] A federal court has an inherent power to suspend, disbar, or otherwise sanction an irresponsible or incompetent attorney. *Ex parte Burr*, 9 Wheat. 529, 531 (1824); *Ex parte Robinson*, 19 Wall. 505, 512 (1874). The court also can issue oral or written reprimands and, as a last resort, impose criminal contempt sanctions.

[34] *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); *Dred Scott v. Sandford*, 19 How. 393, 402 (1857); *Jackson v. Ashton*, 8 Pet. 148 (1834); *Capron v. Van Noorden*, 2 Cranch 126, 127 (1804).

Willy was not sanctioned for interfering with the district court's determination of its lack of jurisdiction. He was sanctioned for his lawyer's purported misconduct during the district court's unconstitutional exercise of federal judicial power over the merits of his case, against which he repeatedly and properly protested, at every relevant stage of the proceedings. The award of attorney's fees to Coastal violated Article III and seriously compromised the long-standing, firmly entrenched principle of federal constitutional law that the authority to adjudicate cases and controversies must emanate from the Constitution and Congress, not from the mere inclination of a federal judge that having such power might be useful. Judges enjoy no exemption from constitutional restraints. "The courts, no less than the political branches of the government, must respect the limits of their authority." *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988).

CONCLUSION

The district court's sanctions order, and the judgment of the court of appeals affirming it, are unconstitutional and should be reversed.

Respectfully submitted,

MICHAEL A. MANESS
Counsel of Record
for Petitioner
1900 North Loop West
Suite 500
Houston, Texas 77018
(713) 680-9922
(713) 680-0804 (FAX)

July 1991

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the imposition of a sanction mandated under Rule 11 of the Federal Rules of Civil Procedure may be sustained as an exercise of a district court's inherent or congressionally delegated authority over collateral matters, despite a subsequent determination by the court of appeals that the district court lacked subject matter jurisdiction over the underlying case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1150

DONALD J. WILLY,

Petitioner,

v.

THE COASTAL CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS

STATEMENT

Petitioner Donald J. Willy ("Willy") was employed as an in-house attorney by the Coastal States Management Corporation, a subsidiary of respondent, The Coastal Corporation ("Coastal").[1] In 1984, Willy's employment was terminated, prompting Willy to institute a federal administrative proceeding against Coastal under the "whistleblower" provisions of various federal environmental statutes. See *In re Willy*, 831 F.2d 545 (5th Cir. 1987). Willy also filed a lawsuit against Coastal and

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[1] The other defendants (respondents herein) are Coastal States Management Corporation, James R. Paul, George L. Brundrett, Charles F. Jones, William L. Dunker and E.C. (Bud) Simpson. The various respondents will be referred to, collectively, as "Coastal."

the other respondents in state court in Texas, alleging that he was wrongfully discharged.

Because Willy's "wrongful discharge" complaint contained apparent allegations that Coastal had violated various federal statutes, Coastal, in good faith (Pet. App. A52), removed the action to the United States District Court for the Southern District of Texas on the basis of federal question jurisdiction.[2] Willy promptly filed a motion to remand the matter to state court. That motion was denied by the district court in April 1986. See Pet. Br. 3. Following denial of the motion to remand, the parties filed motions addressing the merits of the case. Coastal filed a motion to dismiss the complaint, and Willy responded with, *inter alia*, a motion for partial summary judgment. See Pet. Br. 4.

The district court, in an order dated November 12, 1986, granted Coastal's motion to dismiss. Pet. App. A1. At the same time, the court addressed Coastal's motion for Rule 11 sanctions against Willy and his counsel. *Id.* at A6-A8. The district court found that "Plaintiff, an attorney himself, and his counsel" used their various filings before the court "to create a blur of absolute confusion." *Id.* at A7. The court noted, for example, that in response to the court's permission to file "appropriate and competent summary judgment evidence," Willy and his attorney filed

> a 1,200 page, unindexed, unnumbered, foot-high pile of material which this Court is unable, after examination, to fathom and which is determined to be a conscious and wanton affront to the judicial process, this Court and opposing counsel.

Pet. App. A7; see also *id.* (filings on summary judgment motion were "irresponsible at a minimum and at worst intentionally harassing").

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[2] See appendix in the court of appeals, vol. 7, pp. 1096-98, 1100-05.

Moreover, the court found that Willy's "transgressions" of Rule 11 were not limited to that summary judgment filing. The court noted that Willy based an argument in response to the motion to dismiss on a nonexistent provision of the Federal Rules of Evidence—"an example of Plaintiff's and Plaintiff's counsel's careless pleading and a strong indication of intentional harassment." Pet. App. A8. In sum, the district court concluded that it had "spent enough time on this case to be sorely concerned with the actions of the Plaintiff and Plaintiff's counsel. The conduct of this suit has been inexcusable . . . ." *Id.* Rule 11 sanctions, in the amount of $22,625, were assessed against Willy and his counsel, jointly and severally, to discipline them and to compensate Coastal for the costs of responding to "improper pleadings."

The court of appeals reversed the judgment dismissing Willy's complaint on the ground that the district court lacked subject matter jurisdiction. *Willy* v. *Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988) ("*Willy I*"); Pet. App. A9-A40. The court of appeals, however, rejected Willy's argument that the "sanctions were inappropriate and that the amount of the sanction was excessive." *Id.* at A35.

The court of appeals held, at the outset, that "we and the district court retain jurisdiction over the Rule 11 aspect of this case . . . ." Pet. App. A35. In response to Willy's argument that sanctions should not have been imposed, the court held that filing "mountainous piles of unorganized documents and citing to nonexistent rules of law are precisely the sort of conduct" that fails to meet the objective standards of Rule 11 and that reflects an intent to "harass or delay." *Id.* at 36. Indeed, the court of appeals noted that the district court's "list of [Willy's] conduct that violated Rule 11 was not meant to be comprehensive" and that Coastal had identified other violations of the Rule by Willy. *Id.* In sum, the court concluded that "the district court clearly did not abuse its discretion in determining that Willy had violated Rule 11." *Id.*

The court of appeals also found "the type of sanction" imposed under Rule 11—a joint and several award of attorneys' fees—was "appropriate." *Id.* The court concluded, however, that the district court had not adequately explained its findings with respect to the "amount of and basis for" the monetary sanction at issue. *Id.*; see also *id.* (district court should explain whether award of attorneys' fees as Rule 11 sanction "satisfied the requirements that the fees must have been reasonably incurred *as a result of* a violation of Rule 11 and in light of the duty to mitigate") (emphasis in original). Accordingly, the "sanctions order" was "remanded to the district court for further proceedings consistent with" the Fifth Circuit's *en banc* decision in *Thomas* v. *Capital Sec. Servs., Inc.*, 836 F.2d 866 (5th Cir. 1988). Pet. App. A38.

On remand, the district court reiterated its catalogue of the "improper conduct" by Willy and his attorney that formed the basis of its original sanctions order, including:

> citation of a nonexistent rule of evidence, Plaintiff's filing of confusing and misleading pleadings, his misleading misquotation of an applicable disciplinary rule, and, most notably, his filing of a 120-page Motion for Summary Judgment that was accompanied by some 1200 pages of unnumbered, unindexed, and largely irrelevant documents . . . .

Pet. App. A41. The court also enumerated additional sanctionable conduct on the part of Willy and his counsel, including:

> a. Plaintiff reinserted in a subsequent pleading allegations which had been previously stricken by the Court . . .;
>
> b. Plaintiff filed responses to Defendants' Motion to Dismiss which where confusing, misleading, and not reasonably based on law or fact;
>
> c. Plaintiff, without reasonable basis in law or fact, asserted in a response to Defendants' Motion to Dismiss that Defendants' counsel . . . was engaged in an improper conflict of interest;
>
> d. in a pleading, Plaintiff misquoted [a disciplinary rule] of the Texas Code of Professional Responsibility, and then proceeded in that pleading to discuss the Disciplinary Rule as though the language he had omitted did not exist . . . .

Pet. App. A43-A44.[3]

In sum, the district court found that Coastal had expended "at least" $19,307 in attorneys' fees "as a direct and proximate result of the Rule 11 violations" listed by the court. Pet. App. A46. Because Coastal had "acted reasonably in attempting to mitigate expenses as a result of the Rule 11 violations," the court entered an order awarding Coastal $19,307 "for the attorneys' fees incurred in responding to" Willy's Rule 11 violations. *Id.* at A46-A47.[4]

The Fifth Circuit affirmed. *Willy* v. *Coastal Corp.*, 915 F.2d 965 (5th Cir. 1990); Pet. App. A48-A56. With respect to the issue on remand—the need for further explanation of the "amount of and basis for" the sanction —the court found "no abuse of discretion in the amount of sanction imposed against Willy and his attorney." Pet.

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[3] The court specifically noted more than 10 separate instances in which "Plaintiff and his counsel had sufficient and repeated notice that they were acting in violation of Rule 11." Pet. App. A44.

[4] Although not necessary to support the order of Rule 11 sanctions, the district court took note of the fact that Willy, "in an effort to harass Defendants in the instant proceeding," had filed a separate lawsuit, in federal court, against Coastal and 80 of its subsidiaries, directors, officers, employees and counsel, alleging violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.*, based on the Defendants' conduct of this litigation. Pet. App. A44. Together with Willy's threat, during a transcribed conference in the case, to "depose no less than 60 individuals in connection with this matter," this misconduct provided further evidence of Willy's "intent to harass" defendants in connection with the litigation of his claim. *Id.*

App. A55. Thus, the court rejected Willy's argument that the sanction was "excessive and unreasonable." *Id.* at A48.

The court of appeals rejected Willy's alternative argument that "because the district court lacked subject matter jurisdiction over the merits of his claim, it was similarly without jurisdiction to impose Rule 11 sanctions." *Id.* at A50. The court reasoned that the holding in *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct 2447 (1990), that enforcement of Rule 11 involved a "collateral issue" and not a "judgment on the merits of an action," *id.* at 2456, supported the Fifth Circuit's previous conclusion that "Rule 11 sanctions w[ere] available even when the district court . . . was without subject matter jurisdiction." Pet. App. A51.

Willy argued that imposition of sanctions was particularly inappropriate because he and his attorney consistently had resisted—not invoked—federal jurisdiction. *Id.* at A52. The court of appeals, however, found that

> Willy and his attorney were sanctioned for objectionable conduct which was independent of the jurisdictional posture in the case. Willy was entitled to contest removal jurisdiction . . . [but] this right did not include the authority to file misleading or incomprehensible pleadings, to use the discovery process for harassment, or to level frivolous allegations of conflicts of interest.

Id. The court also rejected Willy's argument that "if Coastal had not removed the case, Willy would not have had to file the offending pleadings." *Id.* at n.7 ("there was at least a colorable basis upon which Coastal could have sought removal" and "[w]e refuse to find that Coastal's good faith efforts 'caused' Willy and his attorney to engage in sanctionable conduct"). In sum, the court "reaffirm[ed] [its] conclusion in *Willy I* [855 F.2d 1160 (5th Cir. 1988)] that the district court had jurisdiction to impose Rule 11 sanctions upon Willy and his attorney." Pet. App. A54.

SUMMARY OF ARGUMENT

Rule 11 of the Federal Rules of Civil Procedure, by its plain terms, applies not just to filings in cases in which the district court has correctly asserted subject matter jurisdiction, but extends to "[e]very" paper filed in federal court. Fed. R. Civ. P. 11. Furthermore, Rule 1 states that the rules govern "in all suits of a civil nature," and Rule 81(c) states that the rules specifically "apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal." Fed. R. Civ. P. 1, 81(c); see also 28 U.S.C. § 2072. The plain language of these rules establishes that Rule 11 applies to the procedural misconduct for which sanctions were imposed here. The only question presented here is whether Article III of the Constitution deprives district courts of authority to impose sanctions for litigation misconduct if it is later determined that the court lacked subject matter jurisdiction over the underlying case.

Article III imposes no such limit. The Constitution limits the federal courts in the exercise of their judicial power to the categories of cases or controversies listed in Article III. But there are two other constitutional sources of judicial authority, long recognized by this Court, that each independently supports the sanctions ordered here.

First, federal district courts have inherent authority to sanction attorneys and parties whose litigation misconduct violates the standards of professional responsibility embodied in rules such as Rule 11. This authority is intrinsic to any "Court" as that term is used in Article III and, accordingly, is vested in the federal courts contemporaneously with Congress's exercise of its constitutional authority to "ordain and establish" "such inferior Courts." U.S. Const. art. III, § 1. Such inherent authority is independent of the grant of subject matter jurisdiction to the federal courts. *Young* v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987); *Michael-*

son v. *United States ex rel. Chicago, St. P., M. & O. Ry.*, 266 U.S. 42, 65-66 (1924); *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324, 327 (1904).

Although the inherent power of the federal courts is neither unlimited nor to be drawn on imprudently, it properly may be invoked by the courts to manage proceedings before them, to vindicate their authority and to take additional actions necessary to the exercise of all other powers. *Chambers* v. *Nasco, Inc.*, 111 S. Ct. 2123, 2133 (1991); *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980); *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Like the power to hold litigants in criminal contempt, the courts' inherent power to enter sanctions in this case is necessary to vindicate its authority. The power to impose these sanctions is also a necessary corollary of a courts' inherent power to determine its own jurisdiction.

Second, federal district courts have authority delegated to them by Congress to enforce procedural rules as necessary to ensure the orderly management of the judicial process. *Hanna* v. *Plumer*, 380 U.S. 460, 472 (1965). By virtue of Congress's power under Article III to establish inferior courts and its power under Article I to make all laws necessary and proper to the execution of its other express powers, Congress may grant and has granted the courts authority to take a variety of actions not predicated on the existence of subject matter jurisdiction. *Cf. Mistretta* v. *United States*, 488 U.S. 361, 389 & n.16 (1989). The only restriction on Congress's power to delegate authority to the Judiciary is the requirement embodied in the principle of separation of powers that the federal courts not be allowed to exercise authority that is more appropriately exercised by a different branch of government. The Rule 11 sanctions ordered here do not transgress that limit.

In particular, Congress has granted this Court authority to promulgate and enforce procedural rules neces-

sary to the operation of the courts. *Hanna*, 380 U.S. at 471; *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 15-16 (1941). By virtue of its delegation of authority to promulgate the Federal Rules of Civil Procedure and its subsequent approval of those Rules as provided by the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, Congress has granted the district courts authority to levy Rule 11 sanctions in all cases pending before them, without regard to the eventual determination on appeal concerning subject matter jurisdiction. This grant of power reflects the courts' need for authority to enforce procedural rules in all civil actions pending before them, regardless of the ultimate disposition of the question of subject matter jurisdiction, as well as the fact that the courts are best suited to implement and enforce procedural rules.

Accordingly, there is no constitutional impediment to the enforcement of the sanctions ordered here. Nor is there any reason why this Court, in the exercise of its supervisory authority, should restrict the authority of the district courts to impose sanctions in these circumstances. The power to order sanctions for harassment or other inappropriate litigation tactics is necessary to vindicate the authority and legitimacy of the court and to deter future misconduct. Such sanctions do not encroach on the authority of either of the coordinate branches, nor do they trench on the legitimate concerns of the States. Like the Executive and Legislative Branches, the States have no interest in seeing those who have violated procedural rules governing conduct in the federal courts gain a reprieve from appropriate sanctions.

ARGUMENT

THE DISTRICT COURT RETAINED BOTH INHERENT AND CONGRESSIONALLY DELEGATED AUTHORITY TO ENFORCE RULE 11 SANCTIONS AGAINST PETITIONER FOR LITIGATION ABUSES, DESPITE THE SUBSEQUENT DETERMINATION THAT THE COURT LACKED SUBJECT MATTER JURISDICTION IN THIS CASE.

Petitioner's argument, at its core, is that, unless a district court either has subject matter jurisdiction over an underlying case or controversy under Article III or is in the process of determining jurisdiction, the court lacks all constitutional authority to impose attorneys' fees as a sanction under Rule 11 for serious litigation abuses. This Court has long recognized, however, that there are two constitutional sources of judicial authority in addition to subject matter jurisdiction over cases and controversies: (1) the authority of the federal courts to manage proceedings before them that inheres in the very existence of "Courts" as an institution identified in Article III, and (2) the authority vested in the federal courts by Congress pursuant to its power under Article I to make laws "necessary and proper" to the administration of justice. These sources of judicial authority independently provide the district court with power to respond to a full range of litigation abuses, including sanctioning petitioner for filing "inexcusable," "irresponsible" and "intentionally harassing" pleadings. See Pet. App. A7-A8. The sanctions ordered here are fully consistent with the powers inherent in the federal courts under Article III and granted by Congress through Article I, and the power to issue such sanctions is essential to maintaining the integrity of those courts.

A. Rule 11 Plainly Applies To All Civil Actions In The United States District Courts, Whether Or Not The District Court Has Subject Matter Jurisdiction Over The Action.

Rule 11 of the Federal Rules of Civil Procedure requires that "[*e*]*very* pleading, motion, and other paper"

filed in federal court must be signed by at least one attorney of record. Fed. R. Civ. P. 11 (emphasis added). Under Rule 11, the attorney's signature

> constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

Id. Rule 11 further provides that, upon discovery of a violation of the Rule, a district court "shall impose . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing . . . ." *Id.* As this Court has observed, the plain meaning of Rule 11 is clear: it requires an appropriate sanction for pleadings filed in violation of its terms. *Business Guides, Inc.* v. *Chromatic Communication Enters., Inc.*, 111 S. Ct. 922, 928 (1991).

Rule 11 is designed to vindicate the integrity and dignity of the district court, *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447, 2454-56 (1990), and "[t]here is little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure . . . ." *Business Guides*, 111 S. Ct. at 934. "[T]he imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate." *Cooter & Gell*, 110 S. Ct. at 2455-56 (Rule 11 sanction is a collateral order that may be issued "after an action is no longer pending").

Nothing in the plain language of the Rules Enabling Act and the Federal Rules of Civil Procedure limits the

application of Rule 11 to cases in which the district court has subject matter jurisdiction. The Rules Enabling Act confers upon the Supreme Court the power without limitation "to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts. . . ." 28 U.S.C. § 2072.[5] The Rules themselves expressly govern procedure "in all suits of a civil nature" unless specifically excepted, Fed. R. Civ. P. 1, and specifically "apply to all civil actions removed to the United States district courts from the state courts and govern procedure after removal." Fed. R. Civ. P. 81(c). Moreover, the mandatory phrasing of the sanctions provision of Rule 11 underscores the intention of the drafters to reach *all* instances of bad-faith pleading. Fed. R. Civ. P. 11; see *Cooter & Gell*, 110 S. Ct. at 2455. Barring constitutional impediment, the plain language of the Rules is dispositive. See *id.* at 2453; *Business Guides*, 111 S. Ct. at 928; *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 110 S. Ct. 456, 458 (1989).

Petitioner argues that, despite the fact that Rule 11 plainly is applicable on its face, the imposition of Rule 11 sanctions against him was unconstitutional because the conduct for which petitioner was sanctioned occurred in connection with briefing the merits of a case that the district court was ultimately found not to have jurisdiction to hear. To the contrary, the federal courts' inherent and statutory authority to regulate matters of practice and procedure—which is independent of their Article III judicial power to decide cases or controversies—fully supports the affirmance by the court below of the sanctions against petitioner in the circumstances of this case.

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[5] Although phrased differently, Section 2072 as it existed before 1988 conferred similarly broad authority in all relevant respects, including the authority to prescribe rules of practice and procedure "in civil actions."

B. The Inherent Power Of Federal Courts To Issue Sanctions For Abuse Of The Judicial Process Provides Independent Authority For The Imposition Of A Sanction Under Rule 11, Regardless Of The Court's Subject Matter Jurisdiction Over The Merits Of The Underlying Dispute.

In addition to their "judicial power" to decide cases and controversies under Article III, federal courts have inherent authority to manage proceedings before them and to engage in a range of activities consistent with their role as courts. Because Rule 11 implements a court's inherent authority "to police itself," *Chambers* v. *Nasco, Inc.*, 111 S. Ct. 2123, 2133 (1991), courts have power to impose sanctions under Rule 11 even when they lack jurisdiction over the merits of the case.

1. Article III establishes the judicial branch and defines the subject matter jurisdiction of the federal courts. Section 1 of Article III vests the "judicial Power of the United States" in "one supreme Court" and such "inferior Courts" as Congress may "ordain and establish." U.S. Const. art. III, § 1. Section 2 states that the judicial power "shall extend to" certain specified categories of cases or controversies. *Id.* at § 2. This Court has held that the judicial power is limited to those classes of cases identified in Section 2. *E.g.*, *Muskrat* v. *United States*, 219 U.S. 346, 356 (1911). Nevertheless, this Court also has recognized that although Article III delimits the scope of the "judicial power" granted to the federal courts, those courts also possess those powers that are inherent in any "Court" as that term is used in Article III, and that those powers arise by virtue of the creation of those "inferior Courts" by Congress.

It has long been settled that federal courts possess inherent authority to take such action as may be necessary to manage proceedings before them and to vindicate their authority. In *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812), this Court recognized that, in addition to the

judicial power over the subject matter listed in Article III, federal courts possess "inherent authority" that "must necessarily result to our courts of justice, from the nature of their institution"; such powers exist, the Court explained, because they are "necessary to the exercise of all others." *Id.* at 34; see *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980) (quoting *Hudson*).

The federal courts possess inherent authority to regulate the "mode of proceeding and process" for litigants that appear before them. *Steamer St. Lawrence*, 66 U.S. (1 Black) 522, 526 (1861) (admiralty); see also *Palermo* v. *United States*, 360 U.S. 343, 345 (1959) (criminal); *Harris* v. *Nelson*, 394 U.S. 286, 299 (1968) (habeas corpus). In some circumstances, that inherent authority may be limited by congressional enactment of procedural rules, *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874), but such inherent power clearly exists and may be exercised (absent expressed congressional intent to the contrary) "even if procedural rules exist which sanction the same conduct." *Chambers*, 111 S. Ct. at 2135. Thus, in *Chambers*, the Court upheld a district court's exercise of its inherent power to impose sanctions even though the court "could have employed Rule 11." *Id.* at 2136. Similarly, in *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962), the Court held that a federal court had " 'inherent power' " to dismiss a case *sua sponte* for lack of prosecution. *Id.* at 630. The Court noted that Fed. R. Civ. P. 41(b) provides for involuntary dismissal upon the defendant's motion, but held that Rule 41(b) did not abrogate the courts' inherent power to take such action. *Id.* at 630-31. Such authority is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.*; see *Michaelson* v. *United States ex rel. Chicago, St. P., M. & O. Ry.*, 266 U.S. 42, 66 (1924) (Congress may regulate, but not abrogate, the federal courts' inherent powers).

A federal court's inherent powers arise *independently* of subject matter jurisdiction, and vest with the court at the time it is "establish[ed]" as a "Court." U.S. Const. art. III, § 1. This Court has made this plain with regard to the courts' contempt power, which is the "most prominent" of their inherent powers. *Roadway Express*, 447 U.S. at 764.[6] As the Court has repeatedly explained:

> That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, *when called into existence and vested with jurisdiction over any subject*, at once become possessed of the power.

Young v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 795 (1987) (quoting *Michaelson*, 266 U.S. at 65-66) (emphasis added); see also *Ex Parte Robinson*, 86 U.S. (19 Wall.) at 510 ("The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this [contempt] power"); *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324, 327 (1904) (same).[7] Thus, for ex-

[6] "[I]t is firmly established" that the power to enforce all judicial orders by means of the contempt power " 'is inherent in all courts.' " *Chambers* v. *Nasco, Inc.*, 111 S. Ct. 2123, 2132 (1991) (quoting *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874)); see *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324, 326 (1904) ("The power to punish for contempt is inherent in all courts").

[7] This same reasoning supported the Court's holding in *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821), that Congress has the power to punish those who act in contempt of congressional proceedings. The foundation of the Court's decision was the fact that federal courts are "universally acknowledged to be vested, *by their very creation*, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates, and as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution." *Id.* at 227-28 (emphasis added). The Court then reasoned that the legislative branch, no less than the judiciary, must have the power

ample, the inherent contempt power may be exercised in relation to an administrative or other function entirely separate from the resolution of cases or controversies.[8] Similarly, courts have power to levy sanctions for criminal contempt even if they lack jurisdiction over the subject matter of the underlying lawsuit. *United States* v. *United Mine Workers*, 330 U.S. 258, 293-95 (1947); see *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 450-52 (1911) (settlement of main case does not affect independent proceeding for criminal contempt arising out of that case); Pet. Br. 25.[9]

Because the inherent powers of a federal court come into being concurrently with its establishment, the exist-

"to guard itself from contempts" if it is to function effectively. *Id.* at 228. See also *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812) ("any political body [has] an implied power to preserve its own existence and promote the end and object of its creation").

[8] See, *e.g.*, *In re Rumaker*, 646 F.2d 870 (5th Cir. 1980) (examiner held in contempt for failure to appear at naturalization hearing); Pet. Br. 25-26.

[9] Of course, the courts' inherent powers are most frequently exercised in the course of deciding cases and controversies within their jurisdiction. For example, inherent power provides authority to vacate a judgment obtained through fraud, *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944), to dismiss an action on the ground of *forum non conveniens*, *Chambers*, 111 S. Ct. at 2132 (citing *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 507-08 (1947)), or to dismiss an action for failure to prosecute. *Link* v. *Wabash R.R.*, 370 U.S. 626, 630-31 (1962). Federal courts also may use their inherent power to assess attorneys' fees against a party who has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers*, 111 S. Ct. at 2133 (quotations omitted); see *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 766 (1980); *Hutto* v. *Finney*, 437 U.S. 678, 689 n.14 (1978) (inherent power to impose attorneys' fees for "delaying or disrupting the litigation or hampering enforcement of a court order"). But the source of the court's power to take such actions lies ultimately not in its "judicial power" to decide cases and controversies but in the power inherent in its establishment as an Article III "Court."

ence of subject matter jurisdiction over any particular case is not a constitutional prerequisite to the court's exercise of inherent powers.[10] The imposition of sanctions, for example, "transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of vindicat[ing] judicial authority . . . and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy." *Chambers*, 111 S. Ct. at 2133 (quotations omitted). Similarly, a federal court has inherent authority to control admission to its bar and to suspend, disbar or otherwise impose sanctions on attorneys who appear before it, regardless of whether an Article III case or controversy involving that attorney is pending before the court at that time. *Ex parte Robinson*, 86 U.S. (19 Wall.) at 512; *Roadway Express*, 447 U.S. at 766-67; see Pet. Br. 34. The inherent power also extends to the regulation of conduct that occurs within the courtroom, so that a federal court has authority to expel a disruptive criminal defendant, *Illinois* v. *Allen*, 397 U.S. 337 (1970), or to adopt "[p]rocedural rules governing court administration." Pet. Br. 28 n.29 (conceding authority to enforce rules, "for example, barring television cameras or recording devices in federal courtrooms").

Finally, federal courts possess inherent power to determine whether they have jurisdiction in particular cases. Although not explicitly referenced in Article III, the federal courts' inherent power to determine jurisdiction is well established as a basis for asserting jurisdiction over complaints filed in or removed to federal court and for

[10] This Court pursuant to its supervisory authority can limit the discretion of the lower federal courts in the exercise of their inherent powers. See, *e.g.*, *Young* v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 802-09 (1987) (exercising supervisory authority to limit inherent power to appoint private attorneys to prosecute contempts). As discussed in Part D, *infra*, there is no need for the Court to limit the discretion of the lower courts in cases like this one, and many reasons not to do so.

issuing all orders necessary to the resolution of jurisdictional questions. *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 78-79 (1988); *United Mine Workers*, 330 U.S. at 291-92; 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3536 (1984).[11] Indeed, as discussed *infra*, pages 24-26, a court's inherent power to determine whether it has jurisdiction provides sufficient authority to sustain a judgment on the merits, entered subsequent to an erroneous determination of judisdiction, from collateral attack. *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938). The federal courts' jurisdiction to determine jurisdiction dramatically illustrates the existence of and need for the courts' inherent power—apart from Article III—to take actions "necessary to the exercise of all others." *Hudson*, 11 U.S. (7 Cranch) at 34.

2. The power of the federal courts to order sanctions when litigants violate Rule 11 rests ultimately on their inherent power. Given the federal courts' inherent power to regulate the "mode of proceeding and process" in matters before them, *Steamer St. Lawrence*, 66 U.S. (1 Black) at 526, federal courts are not dependent on congressional authorization for the promulgation and employment of procedural rules. Even if Congress had not expressly authorized the federal courts to impose sanctions in circumstances such as this case (although, in fact,

[11] A determination of the existence of subject matter jurisdiction may involve extended proceedings before the district court, and, accordingly, the court's inherent authority includes the power to exercise procedural control over the case while reaching the jurisdictional determination. See *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79 (1988) (citing *United States* v. *Shipp*, 203 U.S. 563, 573 (1906)); see also *Bowyer* v. *U.S. Dep't of Air Force*, 875 F.2d 632 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 846 (1990); *Szabo Food Serv., Inc.* v. *Canteen Corp.*, 823 F.2d 1073, 1078 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); *Hatteras of Lauderdale, Inc.* v. *Gemini Lady*, 662 F.Supp. 1525 (S.D. Fla. 1987), *aff'd*, 853 F.2d 848 (11th Cir. 1988).

it has, see Part C, *infra*), the federal courts would retain inherent authority to do so.

For example, in *Michaelson* v. *United States*, when the Court reviewed the constitutionality of a statute that required a jury trial for "specified kinds of contempt," the Court took pains to make clear that although the inherent power of courts to punish for contempt "may be regulated [by Congress] within limits," the "attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative." 266 U.S. at 62, 66. Similarly, when Congress, through the Conformity Act of 1872, ordained that the rules of procedure in federal court should conform "as near as may be" to the rules of court of the state in which it was located, the Supreme Court held that the lower courts retained "the power to reject . . . any subordinate provision in [the] state [procedural] statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals." *Indianapolis & St. L. R.R.* v. *Horst*, 93 U.S. 291, 300-01 (1876); see also *Shepard* v. *Adams*, 168 U.S. 618 (1898).

It is true, of course, that Congress, which possesses the power to ordain and establish (and thus presumably to abolish) the federal courts, retains plenary control over their subject matter jurisdiction.[12] But the reasoning of *Michaelson* is not inconsistent with the acknowledgment of that power. Article III grants Congress power to establish not just any adjudicatory tribunals but only inferior "Courts"—and once those "courts" are created they necessarily possess inherent power, regardless of their jurisdiction. *Supra*, pages 15-17. This Court's recog-

[12] The Court has long distinguished between the inherent power of courts to regulate judicial procedure and the plenary power of Congress to determine the subject matter jurisdiction of the lower federal courts. *E.g.*, *Venner* v. *Great N. Ry.*, 209 U.S. 24, 35 (1908); *Steamer St. Lawrence*, 66 U.S. (1 Black) 522 (1861).

nition that certain powers are inherent in the nature of a "court" is a recognition that Article III, by its plain terms, prevents Congress from ordaning and establishing adjudicatory tribunals under Article III that do not possess those powers.

Rule 11 simply "build[s] upon and expand[s] the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation." *Chambers*, 111 S. Ct. at 2134-35 (quoting Adv. Comm. Notes on the 1983 Amendment to Rule 11). Rule 11 thus directs the exercise of the federal courts' inherent authority to sanction litigants and their counsel.

3. The district court had authority to sanction petitioner for misconduct that violated Rule 11 under either of two attributes of its inherent power. First, the entry of Rule 11 sanctions was permissible under the court's inherent power to police itself and to sanction parties who abuse the judicial process. Second, the entry of Rule 11 sanctions was permissible as a collateral order founded on the court's inherent power to determine its own jurisdiction.

a. It is undisputed that federal courts have inherent power to protect the integrity of the courts by holding contumacious litigants in criminal contempt. Federal courts also possess the lesser power to impose sanctions short of contempt for abusive conduct that is offensive to the court but does not merit criminal contempt. "[T]his Court [has] recognized the 'well-acknowledged' inherent power of a court to levy sanctions in response to abusive litigation practices." *Roadway Express*, 447 U.S. at 765 (quoting *Link* v. *Wabash R.R.*, 370 U.S. 626, 632 (1962)).

Like the power to impose criminal contempt, the authority exercised pursuant to Rule 11 vindicates the integrity and dignity of the district court. *Cooter & Gell*

v. *Hartmarx Corp.*, 110 S. Ct. 2447, 2454-56 (1990). The issuance of sanctions under "Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure . . . ." *Business Guides, Inc.* v. *Chromatic Communication Enters., Inc.*, 111 S. Ct. 922, 934 (1991). *Cf. Young*, 481 U.S. at 795-96; *Gompers*, 221 U.S. at 450; *Michaelson*, 266 U.S. at 65-66. It is thus a power "necessary to the exercise of all others." *Hudson*, 11 U.S. (7 Cranch) at 34.

Petitioner largely concedes this point. He states that courts have inherent power to "suspend, disbar, or sanction incompetent or irresponsible lawyers" for conduct that occurs "during [the courts'] mistaken consideration of the merits of cases beyond their subject-matter jurisdiction." Pet. Br. 14; see *id.* at 34 n.33. He argues, however, that any such sanction may not include an award of attorneys' fees because such fees (1) "compensate litigants" who lost on the merits (*id.* at 14, 24) and (2) are tantamount to a judgment "in this case." *Id.* at 17. Petitioner's attempts to distinguish attorneys' fees from other sanctions under Rule 11 have already been rejected by this Court.

First, this Court has repeatedly stated that the purpose of an award of attorneys' fees under Rule 11 is "punitive" rather than compensatory. *Chambers*, 111 S. Ct. at 2137. As the Court explained just last Term in upholding a Rule 11 sanction of "legal expenses and out-of-pocket costs" in *Business Guides*, 111 S. Ct. at 927, "[t]he main objective of the Rule is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses." *Id.* at 934. See also *Cooter & Gell*, 110 S. Ct. at 2454 ("It is now clear that the central purpose of Rule 11 is to deter baseless filings in District Court and . . . streamline the administration and procedure of the federal courts"); *id.* at 2457 (Rule 11 is "aimed at curbing abuses of the judicial system"); *id.* at 2454 (courts must "give effect to the rule's central goal of deterrence"); *id.* at 2460 (same).

Not only has the Court recognized that the central purpose of fee-shifting under Rule 11 is punitive, it has held that the fact that a sanction of attorneys' fees has the effect of compensating one of the parties to the litigation is merely an incidental effect of the Rule. Thus, in *Business Guides*, the Court acknowledged that "[i]mposing monetary sanctions on parties that violate the Rule may confer a benefit on other litigants . . . ." 111 S. Ct. at 934. The Court held, however, that because "Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure," such benefits constitute nothing more than "incidental effects on substantive rights." *Id.* The Court expressly distinguished the sanction of attorneys' fees under Rule 11 from an award of attorneys' fees under a fee-shifting statute because under Rule 11, the sanction of attorneys' fees (1) is "not mandated," (2) is "not tied to the outcome of litigation," and (3) "shift[s] only the cost of a discrete event." *Id.*

Second, this Court has held that imposition of Rule 11 sanctions—far from being a decision on the merits of the case as petitioner contends—is entirely collateral to the court's substantive decision on the merits:

> [T]he imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate.

Cooter & Gell, 110 S. Ct. at 2456. Indeed, the imposition of a sanction under Rule 11, like the exercise of the criminal contempt power, can involve a " 'separate and independent proceeding' " not a part of the underlying litigation. See *id.* (quoting *Bray* v. *United States*, 423 U.S. 73, 75 (1975)).[13]

[13] The Court noted in *Cooter & Gell* that collateral orders, "[l]ike the imposition of costs, attorney's fees and contempt sanctions," may be issued "after an action is no longer pending." *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447, 2455-56 (1990). Such orders involve " 'independent proceeding[s] supplemental to the original proceeding.' " *Id.* at 2455 (quoting *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 170 (1939)). Of course, most procedural orders entered by a district court, such as those related to scheduling, to discovery disputes, to issues to be raised at trial, and so on, are not collateral; a finding that the district court lacked Article III jurisdiction would necessarily mean that such orders would be vacated as well. Orders for sanctions are different. Because such orders serve to vindicate the authority of the court, and because the violation is complete at the time the sanctionable conduct occurs, district courts retain jurisdiction to effectuate such orders even after the underlying action is dismissed. In this regard, sanctions under Rule 37(b) are no different from sanctions under Rule 11. See, *e.g.*, *Roadway Express*, 447 U.S. at 763-64 (Rule 37(b)); *Cooter & Gell*, 110 S. Ct. at 2455 (the "violation of Rule 11 is complete when the [improper] paper is filed") (citation omitted); see also *United States* v. *United Mine Workers*, 330 U.S. 258, 295 (1947) (court would "affirm the judgments for criminal contempt as validly punishing violations of an order then outstanding and unreversed" even if district court lacked jurisdiction over the merits).

The sanction issued here illustrates the point. Petitioner was sanctioned for his failure to meet obligations owed to the court—for filing papers "determined to be a conscious and wanton affront to the judicial process, the [c]ourt and opposing counsel," and for "careless pleading" that gave a "strong indication of intentional harassment." Pet. App. A7-A8. Petitioner's persistent rhetoric notwithstanding,[14] it is plain on the face of the record that

[14] Even in his brief on the merits, where the question presented assumes that sanctionable conduct took place, petitioner cannot bring himself to admit that he was sanctioned for gross procedural misconduct entirely unrelated to any substantive issue in the case. See Pet. Br. 13 (referring to his "purported improprieties"); *id.* at 35 ("purported misconduct"). Petitioner attempts to paint the sanctions as an "award" designed to "compensate [respondents] for wrongly inflicting a case on the federal courts." *Id.* at 24, 33; see also Pet. Br. 21 (courts should not impose sanctions "against those properly resisting the mistaken exercise of subject-matter jurisdiction"); *Id.* at 24 (there is no "necessity" to award fees "against litigants properly contesting federal subject-matter jurisdiction, in favor of litigants mistakenly invoking it"). The record completely rebuts petitioner's attempt rhetorically to link his arguments on

the sanction was based solely on petitioner's misconduct and was entirely collateral to the merits of the jurisdictional issue and to the substantive claims in petitioner's complaint. In sum, the district court's inherent authority to impose sanctions for abusive conduct fully supports the Rule 11 sanction ordered here, and the particular sanction ordered—payment of attorneys' fees—is consistent with the exercise of that power.

b. There is a second, established basis for the exercise of inherent authority that also supports the sanction ordered here. As discussed *supra*, pages 17-18, district courts have inherent authority to determine whether they have jurisdiction in a particular matter. The district court had authority to order sanctions here because the procedural misconduct in question occurred during a proceeding in which the district court had properly asserted jurisdiction to determine jurisdiction.

Petitioner concedes that courts have inherent power to determine jurisdiction and that district courts do not always need subject matter jurisdiction as defined in Article III to have power to enter sanctions.[15] He argues,

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jurisdiction (which were vindicated on appeal) and his sanctionable behavior before the district court (which was not). The sanctions were imposed solely in response to petitioner's improper pleadings, and had *nothing to do* with the validity of either party's jurisdictional arguments.

[15] Pet. Br. 11-12, 19-20, 22-23. Petitioner concedes that "[e]ven in cases beyond the judicial power conferred by Article III, federal courts historically have exercised an inherent . . . power . . . to punish disruptions of or interference with [their] jurisdictional determinations, and to sanction willful disobedience of court orders designed to enable resolution of subject-matter jurisdictional questions. . . ." *Id.* at 22-23. Petitioner also concedes that this power is a necessary adjunct to the courts' inherent power to determine their own jurisdiction. *Id.* at 22-24. In imposing sanctions under such circumstances, however, a court is entering a binding procedural order in a case over which it may not have subject matter jurisdiction. The court could not have the power to do so if entry of procedural orders were dependent upon the existence of an Article III "case or controversy."

however, that a district court's inherent power to enter binding collateral orders pursuant to its inherent jurisdiction to determine jurisdiction does not extend to orders "unrelated to" that determination and ends on the day that the district court mistakenly asserts that it has subject matter jurisdiction. Pet. Br. 20. He thus argues that the santcions ordered here may not be sustained because his "purported improprieties" (*id.* at 13) occurred after the court mistakenly asserted subject matter jurisdiction and "relate only" to the court's decision on "the merits of [the] controversy." *Id.* at 9.

This Court's decisions establish, however, that the power conferred by the federal courts' jurisdiction to determine jurisdiction is sufficient to support any order entered by a federal court—even a final judgment on the merits. In *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938),[16] the respondent sought to recover in state court on a claim against petitioner as guarantor of a bond. Petitioner interposed a defense of *res judicata*, claiming that a prior decision of a federal district court sitting in bankruptcy had extinguished his obligation. The state court "denied effect to [his] plea of *res judicata*," holding that the district court plainly lacked subject matter jurisdiction to enter the judgment. *Stoll*, 305 U.S. at 167, 171.

This Court reversed. The Court assumed, for purposes of decision, that the district court had indeed lacked subject matter jurisdiction. *Id.* at 171 & n.8. It nevertheless held that the district court's jurisdiction to determine jurisdiction provided the basis for a *binding* decision on the merits of petitioner's obligation, and thus that the defense of *res judicata* was valid. Id. at 172.[17]

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[16] See also *Davis* v. *Davis*, 305 U.S. 32 (1938); *Durfee* v. *Duke*, 375 U.S. 106, 112-15 (1963).

[17] In so holding, the Court observed that "[a]n erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the juris-

Stoll thus establishes, contrary to petitioner's argument, that a court's power to enter orders pursuant to its jurisdiction to determine jurisdiction does not end with an erroneous jurisdictional decision. Because a federal court's inherent authority is sufficient to support an order of judgment on the merits, it must be sufficient to support a collateral and "less severe" order, such as an award of attorneys' fees. See *Roadway Express*, 447 U.S. at 765 (greater inherent authority to dismiss for failure to prosecute presupposes authority to enter the less severe sanction of an award of attorneys' fees); *Chambers*, 111 S. Ct. at 2133 (same). Thus, the district court's inherent authority to determine its own jurisdiction provided the necessary power to enter a collateral order of sanctions for petitioner's "inexclusable" and "intentionally harassing" conduct, regardless of whether the court reached the correct result in its determination of the jurisdictional question.

Stoll also indicates that the power conferred by the district court's inherent authority is not narrowly limited to procedural orders issued *in relation to* the determination of subject matter jurisdiction. Indeed, in *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940), the Court applied *Stoll* in circumstances where the parties had not contested subject matter jurisdiction in the original suit, and thus where there was no jurisdictional order to which the final order could possibly "relate." *Id.* at 376-78.

In sum, the district court's order sanctioning petitioner under Rule 11 for repeated abuses of the litigation process is supported by the inherent authority of the federal courts. The exercise of that authority is entirely consistent with Article III limitations on the exercise of judicial power, regardless of the courts' subject matter jurisdiction over the underlying case.

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diction over the subject matter." *Stoll* v. *Gottlieb*, 305 U.S. 165, 172 (1938).

C. Congressional Power Delegated Pursuant To The Rules Enabling Act Provides Independent Authority For The Imposition Of A Sanction Under Rule 11, Regardless Of The Court's Subject Matter Jurisdiction Over The Merits Of The Underlying Dispute.

In addition to their inherent authority, federal courts may exercise power pursuant to authority granted to them by Congress. Under Article III, Congress is empowered to "ordain and establish" the lower federal courts. U.S. Const. art. III, § 1. Under Article I, Congress has authority to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8. This power provides a second source of authority, independent of the courts' inherent power, that supports the invocation of Rule 11 in this case.

Pursuant to its constitutional authority, Congress may create, supplement, and limit the rules of practice and procedure in the lower federal courts which it has created. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9-10 & n.6 (1941) (citing *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 21 (1825)). Indeed, this Court specifically has acknowledged that "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in th[e] [lower federal] courts . . . ." *Hanna* v. *Plumer*, 380 U.S. 460, 472 (1965).

The Rules Enabling Act of 1934, 28 U.S.C. § 2071, *et seq.*, constitutes an exercise of this congressional power. See *Hanna*, 380 U.S. at 471; *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 15-16 (1941); *Mistretta* v. *United States*, 488 U.S. 361, 386-88 (1989). Under that Act, Congress delegated to the Supreme Court the authority to promulgate the Federal Rules of Civil Procedure, which, unless

disapproved by Congress, are binding on the lower courts.[18]

This Court has recognized that Congress's authority to regulate procedure is distinct from the inherent procedural authority (see *supra*, page 14) of the federal courts. Thus, the " 'administration of legal proceedings' " has been defined as an area " 'in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules.' " *Hanna*, 380 U.S. at 472-73 (quoting *Lumbermen's Mutual Casualty Co.* v. *Wright*, 322 F.2d 759, 764 (5th Cir. 1963)). The power that Congress has delegated in the Rules Enabling Act is nevertheless the superior power, and Congress can exercise it to regulate, limit, or supplement the lower federal courts' use of their inherent power, if it chooses to do so, because those "courts were created by act of Congress." *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510-11 (1874); see *Chambers*, 111 S. Ct. at 2134.[19] The power and obligation of a district court to impose sanctions under Rule 11 thus rests not only on the federal courts' inherent powers, but also on the congressional authority underlying the Rules Enabling Act.

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[18] Petitioner concedes that "Congress undoubtedly has a constitutional prerogative" to empower courts to order attorneys' fees "even in cases outside Article III," but argues that to do so Congress must expressly so provide in a statute. Pet. Br. 18 (referring to 28 U.S.C. §§ 1919, 1447(c)). The argument lacks merit because Rule 11 sanctions are authorized by statute. Under the Rules Enabling Act, Congress delegated to this Court power to promulgate rules of procedure for use in all cases, subject to congressional review before taking effect. 28 U.S.C. §§ 2072(a), 2074. The Rules thus have the approval of Congress as well as of this Court. See *Hanna* v. *Plumer*, 380 U.S. 460, 471 (1965); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 15-16 (1944).

[19] As discussed in Part B(2), however, this Court has suggested that there may be limits on the degree to which Congress can constrict the inherent power of the federal courts. See *supra*, pages 18-20.

Finally, it is evident that nothing in the Constitution precludes Congress from granting the courts procedural power to act in circumstances outside of cases or controversies under Article III. Indeed, Congress has regularly granted the courts such power. For example, Congress has provided federal courts with authority to award costs and attorneys' fees against a party who improperly removes a case to federal court, even though a lack of Article III jurisdiction is intrinsic to the finding that removal was improper. See 28 U.S.C. § 1447(c); see also 28 U.S.C. § 1919 (authorizing award of costs against party who improperly brings complaint in federal court).[20] It is also well established that Congress may empower "Article III courts [to] perform a variety of functions not necessarily or directly connected to adversarial proceedings in a trial or appellate court." *Mistretta*, 488 U.S. at 389 n.16. Thus, "[f]ederal courts supervise grand juries and compel the testimony of witnesses before those juries, see *Brown* v. *United States*, 359 U.S. 41, 49 (1959), and participate in the issuance of search warrants, see Fed. Rule Crim. Proc. 41, and review wiretap applications, see 18 U.S.C. §§ 2516, 2518 (1982 ed. and Supp. IV)." *Id.*

All of these powers, entrusted by Congress to Article III courts, involve no exercise of Article III judicial power.[21] There is therefore no reason to assume, as peti-

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[20] See also *Mansfield, C. & L. M. Ry.* v. *Swan*, 111 U.S. 379, 386-87 (1884) (enforcing statute allowing recovery of costs from party who wrongly removes case to federal court); *Phoenix-Buttes Gold Mining Co.* v. *Winstead*, 226 F. 863 (N.D. Cal. 1914) (rejecting constitutional challenge to same statute).

[21] Congress also may delegate to the judicial branch numerous substantive and administrative responsibilities to be carried out in addition to the adjudication of cases under Article III. See, *e.g.*, *Mistretta* v. *United States*, 481 U.S. 361, 384-97 (1989) (upholding the constitutionality of Sentencing Guidelines promulgated by the Sentencing Commission, an independent body created by Congress and placed in the Judicial Branch, and stating that "Congress may

tioner suggests (Pet. Br. 28), that the Rules contain an "implicit premise" that they "are not necessary for disputes beyond the judicial power conferred by Article III." To the contrary, the plain language of Rule 11, Rule 1, and the Rules Enabling Act suggests that Rule 11 is to apply to *all* instances in which parties file harassing or abusive pleadings in district court. See *supra*, pages 10-12. The inclusive language of the Rules makes sense: Courts need rules of procedure for every proceeding, not just for those in which it is ultimately determined that they have subject matter jurisdiction. This case itself illustrates that Rule 11 is "necessary" to protect the integrity of the judicial process and to deter misconduct during proceedings that ultimately may be found to be outside the jurisdiction of the court.

The Rules thus constitute a plain grant of congressional authority to apply sanctions in cases such as this one. As a matter of principle, this Court does not overturn a congressional grant of authority to the judicial branch except for "the most compelling constitutional reasons." *Mistretta*, 488 U.S. at 384 (quoting *Bowsher* v. *Synar*, 478 U.S. 714, 736 (1988)). Moreover, the extension of the Rules' coverage without regard to the district court's underlying jurisdiction was approved not only by Congress when it passed the Rules Enabling Act, but also by this Court when it promulgated Rule 11 and by Congress when it allowed the Rules to take effect. *See* 28 U.S.C. § 2074 (Rule cannot take effect until at least seven months after its submission to Congress for

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delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary"); *Morrison* v. *Olson*, 487 U.S. 654 (1988) (Congress may vest power of appointing special prosecutor in judicial branch); 28 U.S.C. § 331 (creating the Judicial Conference of the United States); 28 U.S.C. § 332 (creating judicial councils of circuits with power to "make all necessary orders for the effective and expeditious administration of the business of the courts").

possible disapproval). Thus, petitioner can succeed on his constitutional argument "only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule[s] . . . [do not] transgress[] . . . constitutional restrictions." *Hanna* v. *Plumer*, 380 U.S. 460, 471 (1965). As this Court has recently observed, this is "a large hurdle to get over." *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, 111 S. Ct. 922, 933 (1991).

In this case, the hurdle cannot be surmounted. Petitioner's suggestions that the delegation of such authority by Congress (1) contravenes the limited authority of the judiciary embodied in separation of powers principles, (2) is inconsistent with this Court's rulings in civil contempt cases, and (3) constitutes an improper extension of the Rules to address substantive rights are all without merit.

1. The application of Rule 11 in cases that are later determined to arise outside the subject matter jurisdiction of the district court is fully consistent with the principles underlying the limited authority of the judiciary under Article III and the separation of powers. In *Mistretta*, 488 U.S. at 383, the Court explained that "[i]n cases specifically involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed 'tasks that are more appropriately accomplished by [other] branches,' *Morrison* v. *Olson*, [487 U.S. 654, 680-81 (1988)] and, second, that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch.' *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 851 (1986)." Neither of these dangers is present in this case.

Whether the power to order sanctions against litigants who abuse the judicial process is viewed as one "allowed" to the Judicial Branch (under its inherent power) or "assigned" to it (by Congress via the Rules Enabling Act),

that power is one that federal courts are uniquely suited to exercise. The exercise of such power by the Judiciary does not constitute a misappropriation of power belonging to another branch, but the exercise of a power that "long has belonged to it." *Mistretta*, 488 U.S. at 396.

If there were any doubt whether Congress viewed the judiciary's exercise of this power to be improper absent express statutory authorization, it is dispelled by the Rules Enabling Act. As the Court explained in *Mistretta*, "Congress expressly has authorized this Court to establish rules for the conduct of its own business and to prescribe rules of procedure for lower federal courts." 488 U.S. at 388. Given the Court's repeated affirmance of Congress's power to delegate such rulemaking authority, the constitutionality of Rule 11 "is no longer an issue for dispute." *Id.* at 386.

Similarly, the application of Rule 11 to penalize misconduct during judicial proceedings later determined to be outside Article III does not encroach upon powers reserved to the Executive Branch. This Court recently held in *Young* v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), that a district court's inherent power to initiate contempt proceedings and to appoint a private attorney to prosecute the contempt does not encroach unduly on the power of the Executive Branch to enforce the law. The judicial power asserted here is far more modest than that at issue in *Young*. Yet the ultimate purpose of the power is the same—to preserve the institutional integrity of the Judicial Branch. The exercise of judicial authority to sanction litigants for misconduct in cases arising outside of the federal courts' subject matter jurisdiction therefore does not violate separation of powers principles.

2. Petitioner also argues that the decision below conflicts with cases in which this Court has held that civil contempt orders, which he terms "functionally equivalent" to sanctions under Rule 11, could not stand where

the court lacked jurisdiction to issue the underlying order that the contemnor violated. See Pet. Br. 20-21 & n.19, 31-32 (citing, *inter alia*, *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988); *United States* v. *United Mine Workers*, 330 U.S. 258 (1947)).[22] Petitioner's analogy between civil contempt and Rule 11 sanctions, however, is fundamentally flawed. In fact, a Rule 11 sanction is much more like a citation for criminal contempt than for civil contempt.

The fundamental difference between civil and criminal contempt is that civil contempt is intended to coerce the contemnor to submit to the authority of the court, whereas criminal contempt is intended to punish the contemnor for disobedience to a court order. See *United States* v. *United Mine Workers*, 330 U.S. 258, 298-99, 303-04 (1947); *id.* at 330-32 (Black, J., concurring); see also *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324, 329-30 (1904); *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S.

[22] Petitioner also relies for general support on this Court's *dicta* in *The Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247 (1868), that "[i]f there were no jurisdiction, there was no power to do anything but to strike the case from the docket." *Id.* at 250; *see* Pet. Br. 12, 20 & n.18. This dictum cannot be read, as petitioner suggests, to refer to a lack of constitutional power to punish litigation misconduct. First, such a reading is flatly inconsistent with this Court's holding in *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447, 2454-57 (1990), that a district court has power to order Rule 11 sanctions following voluntary dismissal of a case. Second, the decision in *Cooper* makes plain that the "power" to which the Court referred was denied not by the Constitution, but rather by the "general rule" of courts in the nineteenth century not to order payment of the prevailing party's costs in cases dismissed for lack of jurisdiction. See *Mansfield*, 111 U.S. at 387. That the rule was not a constitutional one is further shown by Congress's decision to alter it by statute and this Court's decision to enforce the altering statute. *Id.* Third, *Cooper* and its progeny involved the general power to shift costs based on the outcome of a case, which this Court has distinguished from the more fundamental power to shift fees as a sanction for misconduct. *E.g.*, *Roadway Express*, 447 U.S. at 765-66.

418, 441-43, 450-52 (1911). Rule 11 is analogous to criminal contempt because, like criminal contempt, its underlying purpose is "punitive." *Chambers*, 111 S. Ct. at 2137; see *supra*, page 21. Indeed, a Rule 11 sanction cannot serve a coercive purpose where, as is almost always the case, it is imposed after completion of the conduct that triggered it.[23]

Furthermore, while a civil contempt order is intended to coerce compliance with a court order, in practice it often serves as a legitimate procedural method for enabling a party that fears irreparable injury if it complies with the court's order to obtain appellate review. See, *e.g.*, *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988). Should the party establish on appeal that the district court lacks jurisdiction over the subject matter, the party is thereby released from any obligation to comply with the challenged order. *Id.*; see *Gompers*, 221 U.S. 418. Conversely, criminal contempt, because of its inherently punitive nature, must be enforced in order to vindicate the authority of the court regardless of the existence of subject matter jurisdiction, *United Mine Workers*, 330 U.S. at 290, 295, or the existence of a live controversy, *Gompers*, 221 U.S. at 450-52.

Thus, recognition that district courts may enforce Rule 11 even in cases where they lack subject matter jurisdiction is not inconsistent with the Court's ruling regarding civil contempt in *United States Catholic Conference*. In that case, Catholic Conference, a third party to the litigation, refused to obey a discovery request that it believed would cause it irreparable harm, was held in civil contempt, and exercised its right to immediate appeal of the civil contempt order, which was stayed pending appeal. The basis of the appeal was a challenge to the district

[23] *See* Adv. Comm. Notes on Fed.R.Civ.P. 11, 1983 Amendment (sanctions for frivolous pleadings "normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter").

court's subject matter jurisdiction, which the court of appeals refused to entertain. This Court reversed, holding that third parties who challenge civil contempt orders on appeal may raise the lack of subject matter jurisdiction as a defense.

In so holding, the Court noted that "Federal Rule of Civil Procedure 45 grants a District Court the power to issue subpoenas as to witnesses and documents, but the subpoena power of a court cannot be more extensive than its jurisdiction." *Id.* at 76. The Court further reasoned that "if a District Court does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void and an order of civil contempt based on refusal to honor it must be reversed." *Id.* This language, taken out of context, could suggest that the exercise of judicial power under the Rules always is void unless exercised in connection with a case over which the court has subject matter jurisdiction or in which it is determining jurisdiction.

This Court plainly did not mean its decision to be read that broadly. First, the Court took pains to indicate the "limitations of the rule" that it had announced. *Id.* at 78. The Court explained that nothing in the opinion should be thought to upset the settled and "sound" distinction between criminal and civil contempt which allows the former to be enforced even absent subject matter jurisdiction. *Id.* Because sanctions under Rule 11 are akin to criminal rather than civil contempt, they also should be enforceable regardless of subject matter jurisdiction.[24]

[24] Here, for example, petitioner was sanctioned not for challenging the court's jurisdiction, but for filing abusive and dishonest pleadings. His disregard of the court's procedural orders constituted an independent affront to the dignity of the court akin in nature if not degree to contumacious conduct punishable by criminal contempt. By contrast, Catholic Conference was held in civil contempt to coerce compliance with a discovery request; its challenge to juris-

Second, the language quoted above sweeps more broadly even in the area of civil contempt than the Court could have intended. Read literally, for example, the language could preclude a district court from issuing a subpoena relevant to a non-Article III proceeding such as a hearing on whether an attorney should be disbarred, or a grand jury proceeding. But the Court in *Catholic Conference* took care to discuss at length and distinguish *Blair* v. *United States*, 250 U.S. 273 (1919), in which the Court upheld the issuance of subpoenas by a district court in aid of a grand jury investigation. 487 U.S. at 77-78. Thus, although *Catholic Conference* confirms the long-standing rule that an appellate finding of lack of subject matter jurisdiction voids the entry of a civil contempt order, it does not limit the power of district courts to vindicate their authority through punitive sanctions orders under Rule 11 or the criminal contempt power.

3. Finally, contrary to petitioner's suggestion (Pet. Br. 18-19 & n.15), the application of Rule 11 in the circumstances here does not constitute an impermissible adjudication of the substantive rights of the parties. Rule 82 of the Federal Rules of Civil Procedure states that the rules "shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ." Fed. R. Civ. P. 82; see 28 U.S.C. § 2072(b) (rules "shall not abridge, enlarge or modify any substantive right"). The district court's application of Rule 11 does not adjudicate *any* substantive question presented in the complaint or answer, but instead addresses the entirely independent

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diction in the course of its appeal presented no threat to the court's dignity, but was merely a procedurally correct method of obtaining interlocutory review. In this regard, petitioner had available the option of allowing a judgment to be entered against him dismissing his claim and then appealing that decision to the court of appeals. In that way he would have obtained appellate review of the jurisdictional issue immediately. Having refused to take this procedurally correct method for resolving quickly and finally the jurisdictional issue, he was not free to protest the jurisdictional ruling through abuse tactics while the case remained pending in the district court. *Cf.* Pet. 26.

and collateral issue of the proper judicial response to a party's litigation misconduct.

The touchstone of a procedural rule is that "it does not operate to abridge, enlarge or modify the rules of decision by which [the] court will adjudicate [litigants'] rights." *Hanna* v. *Plumer*, 380 U.S. 460, 465 (1965) (quoting *Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438, 445-46 (1946)); see also *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9-14 (1941). In practice, a Rule may "incidentally affect litigants' substantive rights," *Burlington N. R.R.* v. *Woods*, 480 U.S. 1, 5 (1987), yet still be valid so long as its primary purpose is to control conduct in the course of litigation. *Business Guides, Inc.* v. *Chromatic Communication Enters., Inc.*, 111 S. Ct. 922, 934 (1991). *Cf. Insurance Corp. of Ireland* v. *Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 705 (1982) ("not all rules that establish legal consequences to a party's own behavior are 'mere assertions' of power") (quoting *Chicago Life Ins. Co.* v. *Cherry*, 244 U.S. 25, 29 (1917)).

This Court recently held that Rule 11 in particular is a valid procedural rule because it does not control the adjudicatory function, but is merely collateral to the court's adjudicatory tasks. In *Cooter & Gell* v. *Hartmarx Corp.*, this Court held that voluntary dismissal of a complaint under Fed. R. Civ. P. 41(a)(1) does not bar a district court from subsequently imposing sanctions on the plaintiff under Rule 11 for conduct prior to the dismissal. 110 S. Ct. 2447, 2454-57 (1990). Clearly, dismissal under Rule 41(a)(1) deprives the court of all jurisdiction to address the substantive issues in a case. If the court can nonetheless act on collateral matters such as Rule 11 sanctions for abusive conduct, then those sanctions must not implicate the "case or controversy" provisions of the Constitution. *Id.* at 2456 ("Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the

determination of a collateral issue . . ."); see also *Business Guides*, 111 S. Ct. at 934 (distinguishing sanctions under Rule 11 from tort action for malicious prosecution). Because Rule 11 sanctions do not resolve cases or controversies, their imposition may be governed by procedural rule, and they are not restricted by limitations on federal jurisdiction. Here, it is plain that the Rule 11 sanctions ordered by the district court were entirely collateral to the subject matter of petitioner's claim, and thus had, at most, an "incidental" effect on any of petitioner's substantive rights.

In sum, quite apart from the inherent powers of the federal courts, Congress constitutionally may grant and has granted federal courts the power, through the Rules Enabling Act and Rule 11, to sanction parties whose conduct unreasonably interferes with the judicial process even in matters ultimately found not to arise within the subject matter jurisdiction of the courts.

D. The Discretion To Impose Sanctions Under Rule 11 Of The Federal Rules Of Civil Procedure In Circumstances Where The District Court Is Later Determined To Be Without Subject Matter Jurisdiction Is Necessary To Vindicate The Authority And Dignity Of The Court.

The foregoing establishes that nothing in the Constitution or this Court's precedents requires the adoption of the limits on judicial power that petitioner has proposed. Nor would it be desirable for this Court, in the exercise of its supervisory authority, to limit the discretion of the district courts in the manner petitioner has suggested. See *supra*, note 10. Far from promoting any meaningful constitutional values, petitioner's victory would do nothing more than "secure[] the right to file baseless papers." *Cooter & Gell*, 110 S. Ct. at 2456.

Petitioner's theory, which limits "a court's inherent power to police itself" (*Chambers*, 111 S. Ct. at 2133)

to cases over which it either is in the process of determining jurisdiction or has correctly asserted jurisdiction, does not promote values of respect for federalism, separation of powers, or the observance of appropriate limits on the power of the judicial branch. Although observance of the limits on the federal courts' subject matter jurisdiction to decide cases and controversies is critical to these important constitutional values, the entirely collateral question of whether to sanction a party for subjecting a federal court to "irresponsible" and "intentionally harassing" behavior (Pet. App. A7) is not. Although the States properly may object to federal courts' aggrandizement of substantive jurisdiction, they are at best indifferent to those courts' imposition of sanctions on litigants who engage in litigation misconduct. Moreover, the imposition of such sanctions does not intrude on the prerogatives reserved to the other branches of the federal government. See *supra*, pages 31-32.

Depriving the federal courts of the power to impose sanctions, however, would constitute a grave impediment to the administration of justice in the federal courts. Rule 11 is "aimed at curbing abuses of the judicial system," *Cooter & Gell*, 110 S. Ct. at 2457, and that value is just as important when a district court is incorrect in its determination that it has jurisdiction as when it is correct. Petitioner himself has cited numerous cases in which the district courts have imposed Rule 11 sanctions in cases which were later determined to arise outside the subject matter jurisdiction of the Court. Pet. Br. 30-31 & n.31. The scope of the courts' jurisdiction under Article III is not always self-evident. *E.g.*, Pet. App. A13-A34. Indeed, this Court's decisions addressing circuit conflicts on the scope of federal jurisdiction illustrates the complexity of these issues.[25] Thus, district courts will not

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[25] *E.g.*, *Carden* v. *Arkoma Assoc.*, 494 U.S. 185 (1990) (resolving circuit split on scope of diversity jurisdiction); *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176 (1988) (federal question jurisdiction).

infrequently preside, entirely in good faith and in accord with prevailing circuit law, in matters over which it is later found that they lack subject matter jurisdiction.

A rule that deprived the courts under such circumstances of the power to enforce sanctions under Rule 11, as petitioner would do (see Pet. Br. 31), would have serious consequences. It would overrule the settled practice in the lower courts that such sanctions are permissible. It would allow brazen and irresponsible attorneys and litigants to escape unpunished, deprive the district courts of an essential tool for curbing abuses in cases on their dockets, reduce the deterrent effect that Rule 11 is intended to have, and allow litigants to "gamble on the possibility of escaping responsibility for their actions if the court's power to act on the merits eventually is foreclosed." Pet. Br. 23. In addition, the rule advocated by petitioner would have a negative impact more generally on the dockets of the district courts. "Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay." *Cooter & Gell*, 110 S. Ct. at 2457. The waste of judicial resources occasioned by petitioner's conduct (see Pet. App. 35A-36A) affects every citizen who has a legitimate claim on those limited resources.

In sum, limiting the authority of the federal courts to sanction parties would not serve the constitutional values of policing the separation of powers or promoting federalism. Petitioner's rule amounts to nothing more than an unwarranted reprieve for those who abuse the judicial process, and should be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL L. BEATTY
LAWRENCE P. ELLSWORTH
ROBERT C. DEMOSS
THE COASTAL CORPORATION
9 Greenway Plaza
Houston, Texas 77046-0995
(713) 877-6828

CARTER G. PHILLIPS *
MARK D. HOPSON
MARK E. HADDAD
JEFFREY S. STEINBERG
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondents,
The Coastal Corporation, et al.

October 3, 1991

* Counsel of Record

(6)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DONALD J. WILLY,

Petitioner,

versus

THE COASTAL CORPORATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER DONALD J. WILLY

MICHAEL A. MANESS
Counsel of Record
for Petitioner
1900 North Loop West
Suite 500
Houston, Texas 77018
(713) 680-9922
(713) 680-0804 (FAX)

October 1991

Quality Prep & Printing, 3909 Dover, Houston, Texas 77087 (713) 643-1636

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No. 90-1150

IN THE

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OCTOBER TERM, 1991

DONALD J. WILLY,

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THE COASTAL CORPORATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

COASTAL'S ARGUMENT

Coastal and the other respondents ("Coastal") advance three distinct defenses of the district court's sanctions order and the Fifth Circuit's summary affirmance of it.

1. Coastal asserts in Part B of its brief (pp. 13-26) that federal trial courts (and, by implication, the courts of appeals and this Court) are inherently empowered to impose

attorney's fees as a sanction for bad-faith litigation, without congressional authorization or subject-matter jurisdiction, because such awards are collateral to, independent of, and unrestrained by the limitations over cases and controversies prescribed by § 2 of Article III. This transcendent authority supposedly arises from the congressional investiture of the federal courts with a "judicial power of the United States" under Article III § 1 that Coastal claims is different from and superior to the "judicial power" limited by § 2, and from an asserted competence to determine subject-matter jurisdiction, whether correctly or mistakenly, that "is sufficient to support any order entered by a federal court." Brief of Respondents at p. 25.

2. Alternatively, Coastal argues that the Rules Enabling Act, 28 U.S.C. § 2072, and F.R.Civ.P. 11, when read together, provide a source of authority, properly delegated by Congress and implemented by this Court, for awarding attorney's fees to defendants wrongly invoking the federal judicial power (Part A, pp. 10-12; Part C, pp. 27-38). Coastal believes Rule 11 by itself confers jurisdictional competence on a federal district court to award attorney's fees, even if its consideration and disposition of every other aspect of the controversy is foreclosed by Article III.

3. Finally, Coastal offers several reasons why it thinks the result reached by the lower courts is fair and wise as a matter of national judicial policy, and why Willy's position, if adopted by the Court, "would constitute a grave impediment to the administration of justice in the federal courts" (Part D, pp. 38-40).

Coastal is wrong in maintaining that the Constitution distinguishes between a federal court's adjudications of the merits of cases and controversies, which are subject to the constraints of Article III § 2, and its determinations of so-

called "collateral matters," which Coastal says are not so restrained.[1] That untenable distinction is crucial to Coastal's mistaken reliance on *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), which the Fifth Circuit cited, and to its efforts to distinguish *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), the decision that actually controls this case.

Nothing in the text, structure, or history of Article III, or in any of the Court's previous opinions, lends support to Coastal's position. It is capably presented, but it was fashioned *ad hoc*, after the grant of certiorari, to rationalize lower court decisions that never explicitly formulated, articulated, or developed the argument.[2]

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[1] The word "collateral," or some variant of it, appears 22 times in Coastal's brief. The remarkable idea that there is a *constitutional* distinction between cases and controversies under Article III § 2, and "collateral matters" that are not subject to § 2's limitations, is the central feature of Coastal's position.

[2] The Fifth Circuit's first *Willy* opinion miscited two cases, in which plaintiffs sought attorney's fees against defendants wrongly removing actions to the federal court, for the entirely different proposition that defendants wrongly removing a case can recover attorney's fees against the plaintiff. *Vatican Shrimp Co., Inc. v. Solis*, 820 F.2d 674 (5 Cir. 1987), *cert. denied* 484 U.S. 953 (1987); *News-Texan, Inc. v. City of Garland*, 814 F.2d 216 (5 Cir. 1987). Coastal understandably does not rely upon, discuss, or even cite these two cases in its brief before this Court.

The Fifth Circuit's second *Willy* opinion, insisting that the two cases implicitly supported the attorney's fees award, 915 F.2d at 967 n. 6, and that "the imposition of Rule 11 sanctions . . . constitutes [the exercise of] an inherent power" over a "collateral issue" under *Cooter & Gell v. Hartmarx Corp*, 496 U.S. ___, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), found no significance in the fact that the district court in *Cooter & Gell* had Article III subject-matter jurisdiction when the sanctionable misconduct occurred, while the district court here did not.

ARGUMENT IN REPLY

1. Article III § 2 of the Constitution confines the judicial power of the United States to specified cases and controversies and does not permit a federal court to award attorney's fees, as a "collateral matter," to defendants who wrongly invoke its subject-matter jurisdiction.

After reading Coastal's brief, a person unfamiliar with the Constitution of the United States, its history, and the decisions of this Court might suppose that lower federal courts are empowered by Article III to decide two separate and distinct kinds of cases and controversies.[3] One group, involving decisions on the merits that require adjudication of the substantive rights and obligations of the litigants, concededly is limited by the subject-matter jurisdictional constraints of Article III § 2 and by the power of Congress. A second, separate category, involving "collateral matters," seemingly is immune from any constitutional or congressional limitation whatever.

The Supreme Court's decisions in reality recognize no general exemption from the constraints of Article III § 2 for "collateral matters."[4] On the contrary, the Court repeatedly and consistently has regarded all adjudicatory powers of all lower federal courts in all cases (with the possible exception

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[3] "The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature." *In re Pacific Ry. Comm'n*, 32 F. 241, 255 (N.D. Cal. 1887) (opinion of Justice Field).

[4] The characterization of an order, proceeding, or other matter as "collateral" or "ancillary" can have significant consequences in other contexts. *E.g.*, *Cohen v. Beneficial Ind. Loan Corp.*, 337 U.S. 541 (1949); Brief for Petitioner at p. 19 n. 16 (pendent or ancillary jurisdiction). However, if a federal court has no subject-matter jurisdiction over an Article III case or controversy, such concepts confer no constitutional power to act.

of the unique, self-defensive power of criminal contempt) to be limited by § 2, and limitable by the overriding authority of Congress, the representatives of the people who created those courts.

Predictably, Coastal's principal reliance is on *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), the decision mistakenly thought by the Fifth Circuit to be controlling. Coastal asserts that Willy's position is "flatly inconsistent" with *Cooter & Gell*'s central holding that "a district court has power to order Rule 11 sanctions following voluntary dismissal of a case." Brief of Respondents at p. 33 n. 22. In reality, there is no inconsistency at all, flat or otherwise.

When the sanctionable misconduct occurred in *Cooter & Gell*, the district court possessed constitutional power over the controversy under 28 U.S.C. §§ 1331 and 1337, invoked by the plaintiff's factually deficient antitrust complaint, which was also the filing eventually deemed sanctionable. Far from being irrelevant or coincidental, the district court's subject-matter jurisdiction was a crucial and indispensable component of this Court's ultimate holding in that case:

> The view more consistent with Rule 11's language and purposes, and the one supported by the weight of Circuit authority, is that district courts may enforce Rule 11 even after the plaintiff has filed a notice of dismissal under Rule 41(a)(1). . . *The district court's [subject-matter] jurisdiction, invoked by the filing of the underlying complaint, supports consideration of both the merits of the action and the motion for Rule 11 sanctions arising from that filing*. As the "violation of Rule 11

> is complete when the paper is filed," . . . a voluntary dismissal does not expunge the Rule 11 violation. In order to comply with Rule 11's requirement that a court "shall" impose sanctions "[i]f a pleading, motion, or other paper is signed in violation of this rule," a court must have the authority to consider whether there has been a violation of the signing requirement regardless of the dismissal of the underlying action. 496 U.S. at ___, 110 S.Ct. at 2455, 110 L.Ed.2d at 375 (1990) (emphasis added; citation omitted).

The Court in *Cooter & Gell* neither decided nor implied that the district court had power to impose a Rule 11 sanction *apart from* subject-matter jurisdiction. Rather, the Court held squarely that the power to sanction existed precisely *because* the district court possessed subject-matter jurisdiction over the controversy when the punishable misbehavior occurred, even though the case eventually was dismissed before the sanction was assessed:

> Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated. 496 U.S. at ___, 110 S.Ct. at 2456, 110 L.Ed.2d at 376.

Coastal is mistaken in believing that *Cooter & Gell* recognizes a federal court's supposed constitutional authority over "collateral matters," apart from Article III subject-matter jurisdiction. Although the Court held that "a federal court may consider collateral issues after an action is no longer pending," 496 U.S. at ___, 110 S.Ct. at 2455, 110 L.Ed.2d at 375, it did not confirm a federal court's competence to consider such issues before its constitutional power has been established. The Court was not there presented with, and did not decide, any claim that the district court's sanction award violated Article III. The district court's subject-matter jurisdiction, and its constitutional authority to act, were not even in issue.

The same principle underlies the inherent sanctioning power recognized in *Chambers v. NASCO, Inc.*, 501 U.S. ___, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). In that case the question was "whether the District Court, *sitting in diversity*, properly invoked its inherent power in assessing as a sanction for a party's bad-faith conduct attorney's fees and related expenses paid by the party's opponent to its attorneys." 501 U.S. at ___, 111 S.Ct. at 2128, 115 L.Ed.2d at 39 (emphasis added). The Court held that the district court was inherently empowered by the Constitution to deal effectively with the outrageous, irresponsible misbehavior of G. Russell Chambers and his lawyers, even that which antedated the filing of the case, because Congress had conferred diversity of citizenship jurisdiction under 28 U.S.C. § 1332, which the district court properly exercised and which the sanctionable misconduct significantly disrupted. The Court recognized no supposed power over "collateral matters," existing independently and apart from established Article III limitations or a statutory grant of subject-matter jurisdiction.

In contrast, the district court in this case never possessed Article III subject-matter jurisdiction over the controversy at all, at any stage of the proceedings. When Willy's supposedly sanctionable misbehavior occurred, the district court was not exercising subject-matter jurisdiction over an Article III case or controversy. Since the court already had decided incorrectly the jurisdictional issue, it was not exercising jurisdiction to determine its jurisdiction. In short, rather than doing anything that Article III or Congress empowered it to do, the district court was violating the Constitution of the United States, by mistakenly entertaining and resolving an exclusively state-law dispute that it never had any constitutional power to decide at any stage of the proceedings.[5]

Coastal's creative, imaginative, but unprecedented effort to draw a constitutional distinction between § 2 cases and controversies on the one hand and "collateral matters" on the other is ultimately insupportable. This Court's decisions establish that fact very clearly.

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[5] Coastal treats the district court's mistaken assumption of subject-matter jurisdiction as a sort of trivial procedural lapse, explainable by "the complexity of these issues," and excusable because everybody except Willy and Young allegedly acted in "good faith." Brief of Respondents at pp. 2, 39.

This Court historically has regarded the wrongful assertion of federal judicial power over state cases, even in the utmost good faith, as a matter of the most profound seriousness and consequence. See, *e.g.*, *Younger v. Harris*, 401 U.S. 37 (1971) and companion cases; *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). The scope of the Article III judicial power does not depend on subjective states of mind, or on characterizations of proceedings as "collateral." If the district court here had correctly decided it had no subject-matter jurisdiction over the controversy, it would have had no constitutional power to award attorney's fees. It can have no greater power merely because of its own "good faith" jurisdictional mistake.

Costs and Attorney's Fees. In 1875 Congress empowered federal courts to award costs in cases mistakenly removed from a state court and thereafter remanded for lack of subject-matter jurisdiction. In 1911 it provided for such costs in original actions dismissed for lack of subject-matter jurisdiction.[6] Until then, it had "long been the settled practice in the federal tribunals not to grant costs in a cause which is discontinued or dismissed on the ground that the court has no jurisdiction of the subject-matter. This has generally been placed on the ground of want of power in the court." *Cooper v. New Haven Steam-Boat Co.*, 18 F. 588 (S.D.N.Y. 1883); *Phoenix-Buttes Gold Mining Co. v. Winstead*, 226 F. 863, 864 (N.D. Cal. 1914) ("where the action is dismissed for want of jurisdiction, the court loses power to award costs").[7]

Coastal addresses only one of the Supreme Court decisions on which Willy relies, *The Mayor v. Cooper*, 6 Wall. 247 (1868), and then only casually, in footnote 22 at page 33, near the end of its brief. That footnote advances three reasons why Coastal believes costs can be awarded as a "collateral" sanction by a federal court, even in the absence of a statute or Article III subject-matter jurisdiction, and even in the face of the Court's unequivocal holding that, "[i]f there were no jurisdiction, there was no power to do anything but to strike the case from the docket." 6 Wall. at 250.

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[6] Act of March 3, 1875, ch. 137, § 5, 18 Stat. 470, 472; Act of March 3, 1911, ch. 231, § 37, 36 Stat. 1087, 1098.

[7] In addition to the cases cited in Willy's principal brief at p. 20 n. 18, see also *Hornthall v. The Collector*, 9 Wall. 560, 566-67 (1870); *Strader v. Graham*, 18 How. 602 (1856); *Bradstreet v. Potter*, 16 Pet. 317, 318 (1842); *M'Iver v. Wattles*, 9 Wheat. 650 (1824); *Inglee v. Coolidge*, 2 Wheat. 363, 368 (1817); *Montalet v. Murray*, 4 Cranch 46, 47 (1807).

First, Coastal maintains in its footnote 22 that the holding in *The Mayor v. Cooper* is *dictum* that "cannot be read . . . to refer to a lack of constitutional power to punish litigation misconduct," because "such a reading is flatly inconsistent" with *Cooter & Gell*. As Willy has shown, however, there is no inconsistency at all. *Cooter & Gell* did not address any Article III issue, much less the question presented by this case. Moreover, a limitation on the federal judicial power recognized by Chief Justice Marshall and Justice Story as early as 1817 (*Inglee v. Coolidge*, 2 Wheat. 363), and by Justice Brandeis as late as 1925 (*Smyth v. Asphalt Belt Ry. Co.*, 267 U.S. 326), and by at least nine intervening Supreme Court decisions, cannot be dismissed persuasively as mere *dictum*.

Secondly, Coastal's footnote asserts that the power denied by these decisions over the "collateral" issue of costs was not of constitutional dimensions, because Congress subsequently authorized the recovery of costs by statute. Coastal misses the point. Congress' plenary authority over lower federal courts, consigned to it by Article III § 1 and the necessary and proper clause, enables it to provide by statute for recovery of costs against those wrongly invoking federal subject-matter jurisdiction. Absent such jurisdiction, or interference with a jurisdictional determination, the federal courts have no express, implied, or inherent constitutional authority to awartd costs themselves. The Federal Rules provide no help, since a court's power under them "cannot be more extensive than its jurisdiction." *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); F.R.Civ.P. 82.

Finally, Coastal in its footnote thinks *The Mayor v. Cooper* involves only "a general power to shift costs based on the outcome of a case," whereas this case involves a

"more fundamental power to shift fees as a sanction for misconduct." *More fundamental?* Where does it say that in the Constitution, or in any previous decision of this Court?[8] In each instance in which the Court previously has sustained the inherent power of federal courts to award costs or attorney's fees as a sanction for bad-faith civil litigation, the Constitution and Congress already had empowered the federal court to act in the case.[9] This Court has never

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[8] The Starr Committee Report says that there are more than 150 federal fee-shifting statutes that authorize the award of attorney's fees to prevailing parties. REPORT FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (August 1991) at p. 25. If a fee-shifting attorney's fees award specifically authorized by Congress cannot be sustained in the absence of subject-matter jurisdiction, punitive awards of attorney's fees as a sanction cannot be any more sustainable in the absence of such jurisdiction, particularly if only federal judges and not Congress have authorized them. Nothing in the language or history of Article III, or in this Court's decisions, justifies a previously unrecognized constitutional exemption for punitive awards of costs and fees to those wrongly invoking federal jurisdiction.

[9] *E.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. ___ (1991) (diversity of citizenship jurisdiction); *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) (civil rights jurisdiction); *Hall v. Cole*, 412 U.S. 1 (1973) (jurisdiction under Labor-Management Reporting and Disclosure Act); *Vaughan v. Atkinson*, 369 U.S. 527 (1962) (admiralty jurisdiction); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923) (appellate jurisdiction). *Compare Link v. Wabash R. Co.*, 370 U.S. 626 (1962) (inherent power to dismiss diversity action for want of prosecution) *with Davis v. Cluet, Peabody & Co.*, 667 F.2d 1371, 1372 (11 Cir. 1982) (no inherent power to dismiss action on merits, in absence of subject-matter jurisdiction, as a sanction for plaintiffs' "repeated refusal to follow federal and local procedure rules and court orders," since such dismissal would "work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them," citing *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 18 (1951)).

sustained the exercise of such a sanctioning power in a case in which the district court eventually was determined to lack the constitutional power to decide the merits of a case or controversy beyond Article III. Coastal cites no Supreme Court decision for that proposition, because there is none.[10]

Civil contempt sanctions. Effectively conceding that "collateral" civil contempt sanctions cannot be sustained in the absence of subject-matter jurisdiction,[11] Coastal retreats to the position that the attorney's fees awarded against Willy, ostensibly under both Rule 11 and an asserted inherent power, are "much more like a citation for criminal contempt than for civil contempt." Brief of Respondents at p. 33.

That is not what this Court said in *Hutto v. Finney*, 437 U.S. 678, 691 and n. 17 (1978), cited and quoted with approval in *Chambers v. NASCO, Inc.*, 501 U.S. at ___, 111 S.Ct. at 2137, 115 L.Ed.2d at 51:

> [T]he award of attorney's fees for bad faith serve[s] the same purpose as a remedial fine imposed for civil contempt [because it] vindicate[s] the District Court's authority over a recalcitrant litigant. . . That the award ha[s] a compensatory effect does not in any event distinguish it from a fine for civil contempt, which also compensates a private party for the consequences of a contemnor's disobedience.

Attorney's fees awarded as a sanction under Rule 11 or a federal court's inherent sanctioning power are not equivalent to criminal contempt penalties. If they were, they would implicate the same constitutional safeguards afforded those accused of contumacious misconduct, including the presumption of innocence, the standard of proof of guilt beyond a reasonable doubt, and the procedural protections afforded by F.R.Cr.P. 42.[12] Private parties interested in the litigation could not benefit from imposition of criminal sanctions, and their attorneys could not prosecute an action to recover them.[13] Indeed, in that event, Coastal's capable counsel could not even appear before this Court to argue that the sanctions were properly imposed.[14]

Donald Willy is no criminal, but Coastal still cannot bring itself to admit the equivalence of civil contempt sanctions and the attorney's fees awarded against him. To do so effectively would concede defeat, since in that event this case is controlled squarely by *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S.

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[10] In fact, the Court has said that attorney's fees and costs awarded as a sanction under a federal court's inherent power are to benefit those prevailing on the merits of the litigation. *E.g., F. D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116, 129 (1974) ("[w]e have long recognized that attorneys' fees may be awarded to a *successful* party when his opponent has acted in bad faith . . .") (emphasis added); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258 (1975) ("a court may assess attorneys' fees . . . when the *losing* party" has acted in bad faith) (emphasis added). Here the parties recovering attorney's fees did not win the underlying federal litigation. They lost.

[11] *United States v. United Mine Workers*, 330 U.S. 258, 294-95 (1947); *Cliett v. Hammonds*, 305 F.2d 565, 570 (5 Cir. 1962).

[12] *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 66 (1924).

[13] *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).

[14] *United States v. Providence Journal Co.*, 485 U.S. 693 (1988).

72 (1988). Thirty-five pages into its 41-page brief, Coastal makes a last-ditch effort to avoid such a concession by maintaining that the Court's opinion in *Catholic Conference*, joined by seven present members of the Court, "plainly did not mean" what it said: that "the exercise of judicial power under the [Federal] Rules always is void unless exercised in connection with a case over which the court has subject matter jurisdiction or in which it is determining jurisdiction." Brief of Respondents at p. 35.

The Court *plainly did not mean* that? Willy and his counsel believe the Supreme Court of the United States meant precisely what it said with respect to a constitutional issue as fundamental as the scope of the federal judicial power under Article III. Particularly is this so when eight members of the Court joined one opinion, unaccompanied by a single concurrence, that so clearly, simply, and eloquently articulated the important principle at stake here:

> The challenge in this case goes to the subject-matter jurisdiction of the [district] court *and hence its [constitutional] power to issue the order*. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional original, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority. 487 U.S. at 77 (emphasis added).

Suggesting that the Court in *Catholic Conference* carelessly chose its words, and therefore "plainly" did not really mean what it said, is exceedingly implausible.

The district court's lack of subject-matter jurisdiction would have foreclosed its imposition of civil contempt sanctions in this case. *Catholic Conference* precludes its functionally equivalent imposition of attorney's fees, under a supposed inherent power to sanction bad-faith litigation.

Criminal contempt sanctions. The inherent power to impose criminal contempt sanctions is "necessary to the exercise of all others" conferred on a federal court under Article III by a congressional grant of subject-matter jurisdiction. *United States v. Hudson*, 7 Cranch 32, 34 (1812). Federal courts possess inherent criminal contempt power "by their very creation" under Article III § 1, when "called into existence and vested [by Congress] with jurisdiction over any subject."[15] That power arises from an explicit grant of subject-matter jurisdiction, or from an implicit, coordinate power to determine jurisdiction.[16]

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[15] *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 65-66 (1924); *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 327 (1904); *Ex parte Robinson*, 19 Wall. 505 (1874); *cf. Anderson v. Dunn*, 6 Wheat. 204 (1821) (inherent contempt power of Congress).

[16] See, *e.g.*, *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947) ("an order issued by a [federal] court with *jurisdiction over the subject matter* and person must be obeyed by the parties until it is reversed by orderly and proper proceedings") (emphasis added); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911) (federal criminal contempt power serves "to vindicate the jurisdiction and authority of courts"); *cf. Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967) (state court imposing criminal contempt sanctions for violation of injunction "[w]ithout question [had] jurisdiction over the petitioners and over the subject matter of the controversy").

An indispensable ingredient of the federal judicial power to decide cases and controversies is the capability to determine whether the power exists in a given set of circumstances. A federal court "necessarily ha[s] jurisdiction to decide whether the case [is] properly before it," *United States v. Shipp*, 203 U.S. 563, 573 (1906), and if jurisdiction is upheld, "the decision unreversed binds the parties as a thing adjudged."[17] While making jurisdictional determinations, the court has "the inherent and legitimate authority . . . to issue process and other binding orders . . . as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter," *United States Catholic Conference*, 487 U.S. at 79, and to punish violations of those orders by criminal contempt sanctions, regardless of whether its determination of subject-matter jurisdiction eventually is affirmed.

That principle is not at issue here. As in *Catholic Conference*, the district court's sanctions order cannot "be sustained as . . . in aid of the court's jurisdiction over the subject matter," since it related only to "the merits of the litigation," and the district court had "twice [here, three times] ruled that it had subject-matter jurisdiction of the case." 487 U.S. at 79-80. *Catholic Conference* and *Mine Workers* hold that such an order is "void" absent subject-matter jurisdiction and must be reversed "in its entirety."

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[17] *Carter v. United States*, 135 F.2d 858, 861 (5 Cir. 1943), cited in *United States v. United Mine Workers*, 330 U.S. 258, 292 n. 57 (1947).

Coastal cites and discusses *Stoll v. Gottlieb*, 305 U.S. 165 (1938) for the proposition that "jurisdiction to determine jurisdiction is sufficient to support *any* order entered by a federal court" (Brief of Respondents at p. 25) (emphasis added). If that were true, *Catholic Conference* was wrongly decided, an inference Coastal carefully refuses to draw.

2. The Rules Enabling Act and Rule 11 do not provide an independent, constitutionally permissible source of authority for a federal court to award attorney's fees, as a "collateral matter," to defendants who wrongly invoke its subject-matter jurisdiction.

Coastal's alternative argument asserts that Congress has authorized the Court's adoption of Rule 11, and that Rule 11 is applicable by virtue of F.R.Civ.P. 1 to "all suits of a civil nature" in the district courts and "civil actions removed to the United States district courts from the state courts," and therefore "governs procedure after removal," even if the district court lacks subject-matter jurisdiction over the controversy. From this perspective a rule of procedure provides a source of authority for the court to adjudicate entitlement to attorney's fees, even if it is constitutionally powerless to decide any other issue in the case.

After developing this argument, Coastal finally acknowledges at page 36 of its brief that the Federal Rules, including Rule 11, "do not extend or limit the jurisdiction of the United States district courts." F.R.Civ.P. 82. Coastal then reasons that federal jurisdiction has not been "extended" here because the "application of Rule 11 does not adjudicate *any* substantive question presented in the complaint or answer, but instead addresses the entirely independent and *collateral* issue of the proper judicial response to a party's litigation misconduct." Brief of Respondents at pp. 36-37 (first emphasis in original; second emphasis added).

Where is any of this found in the Constitution, or in any previous decision of this Court? Reduced to its essentials, Coastal's alternative contention is that federal courts can adjudicate legal and factual disputes otherwise beyond their Article III subject-matter jurisdiction, and that Congress can

confer the power to do so, as long as they involve "collateral issues," rather than "substantive questions." If "collateral issues" are above and beyond the constitutional limitations prescribed by Article III § 2, why did *Catholic Conference* find the question of whether the district court has subject-matter jurisdiction over the controversy to be determinative of its constitutional power over a "collateral issue": the issuance of a subpoena to a non-party? "Federal Rule of Civil Procedure 45 grants a district court the power to issue subpoenas as to witnesses and documents, but the subpoena power of a court cannot be more extensive than its jurisdiction." 487 U.S. at 76. Rule 11 is no different.

In *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 10 (1941), the Court understandably thought it was self-evident that a federal court's authority to prescribe procedural rules cannot "extend or restrict the jurisdiction conferred by a statute." In this case there was no jurisdiction, because there was no statute. There was no statute, because no constitutional provision authorized one. There is simply no comprehensible way in which the Federal Rules can be deemed to confer on a federal court a power to adjudicate any legal or factual issue, when the Constitution and Congress have not otherwise provided such authority.

Acceptance of Coastal's position effectively would mean that Congress and this Court intended to authorize and prescribe rules of practice and procedure for unconstitutional litigation in the federal courts.[18] There has been and can be no plausible explanation or support for that view.

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[18] "Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983), citing *Hodgson v. Bowerbank*, 5 Cranch 303 (1809) and *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922).

3. Constitutional powers that federal courts do not have cannot be created by arguments that they ought to have them.

Hoping that what the federal judiciary has done in this case can survive constitutional challenge, Coastal's brief in its final section advances reasons why the Court should not in any event exercise its inherent supervisory power to foreclose the award of attorney's fees.

Donald Willy is not a supplicant, begging for "an unwarranted reprieve for . . . abuse [of] the judicial process." Brief of Respondents at p. 40. He is an officer of this Court, admitted to its bar on motion of a former Solicitor General. His constitutional argument provides a principled basis for decision. The inflated rhetoric and offended sensibilities of those who for years have mistakenly burdened the federal judicial system with this case, in violation of the Constitution of the United States, do not.[19]

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[19] From Coastal's perspective, Rule 11 has been applied fairly and even-handedly. A near-impecunious litigant, dragged involuntarily into a federal court, has been ordered to pay $19,307.00 to an $8 billion corporate defendant and others who wrongly removed his state-law case almost six years ago. That mistaken removal, the resulting disruption and delay of a state court proceeding, and the attendant financial consequences all are excused by the defendants' good faith. The district court's erroneous decisions, on the merits and on the jurisdictional question, also are excusable because of the court's good faith and the "complexity of these issues." Brief of Respondents at p. 39.

If the district court had correctly decided this case, Article III would have compelled it to be remanded immediately. Since the court decided it incorrectly, Coastal argues, sound judicial policy demands that the company recover its attorney's fees, because any contrary result "would allow brazen and irresponsible attorneys and litigants to escape unpunished [and] deprive the district courts of an essential tool for curbing abuses in cases on their dockets." Brief of Respondents at p. 40.

If foreclosing the federal judiciary's ability to award attorney's fees as a sanction in cases beyond the judicial power conferred by Article III "would constitute a grave impediment to the administration of justice in the federal courts," Brief of Respondents at p. 39, that problem cannot be solved by making up new constitutional principles, responsive only to the immediate needs of particular cases, rather than to the Constitution's more enduring values. "These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Northern Securities Co. v. United States*, 193 U.S. 197, 400-401 (1904) (dissenting opinion of Justice Holmes). "It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (opinion of Justice Stewart).

CONCLUSION

The district court's sanction order violated Article III of the Constitution. That order, and the judgment of the United States Court of Appeals for the Fifth Circuit mistakenly affirming it, are unconstitutional and should be reversed.

Respectfully submitted,

MICHAEL A. MANESS
Counsel of Record
for Petitioner
1900 North Loop West
Suite 500
Houston, Texas 77018
(713) 680-9922
(713) 680-0804 (FAX)

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